

(2013) 07 BOM CK 0067
In the Bombay High Court
Case No : Criminal Appeal No. 602 of 2000

Armogam Munnaswami Kounder

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 30-07-2013

Acts Referred:

Bombay Children Act, 1948 — Section 57
Criminal Procedure Code, 1973 (CrPC) — Section 164
Evidence Act, 1872 — Section 25, 26
Penal Code, 1860 (IPC) — Section 201, 302, 364, 376(2)(f)

Citation : (2014) 1 BomCR(Cri) 585

Hon'ble Judges : Revati Mohite Dere, J; P.V. Hardas, J

Bench : Division Bench

Advocate : B.G. Tangsali, for the Appellant; U.V. Kejriwal, APP, for the Respondent

Final Decision : Allowed

Judgement

Revati Mohite Dere, J.—This Appeal is being re-heard by us, pursuant to the order dated 24th January, 2013 passed by the Supreme Court in Criminal Appeal No. 1629 of 2007, which was preferred by the State of Maharashtra against the Judgment of acquittal dated 7th September, 2006, passed by this Court. The Supreme Court vide order dated 24th January, 2013 in Criminal Appeal No. 1629 of 2007, was pleased to set aside the Judgment dated 7th September, 2006, passed by this Court, acquitting the Appellant and was pleased to remit the matter back for fresh hearing and decision in accordance with law. In view of the afore-stated, we have taken up this Appeal preferred by the Appellant for hearing, wherein the Appellant has challenged the Judgment and Order dated 19th April, 2000 passed by the Trial Court, convicting him for the offences punishable under 364, 376(2)(f), 302 and 201 of the Indian Penal Code and u/s 57 of the Bombay Children Act, 1948. The appellant was found guilty of the offences punishable; u/s 364 of the Indian Penal Code and sentenced to suffer R.I. for 10 years with a fine of Rs. 5,000/-, in default, R.I. for one year; u/s

376(2)(f) and sentenced to suffer life imprisonment and to pay a fine of Rs. 5,000/-, in default, R.I. for one year; u/s 302 of the Indian Penal Code and sentenced to suffer life imprisonment and to pay a fine of Rs. 5,000/-, in default, R.I. for one year; and u/s 201 of the Indian Penal Code, the appellant was sentenced to suffer R.I. for two years and to pay a fine of Rs. 1,000/-, in default, R.I. for two months. The appellant was also convicted and sentenced for the offence punishable u/s 57 of the Bombay Children Act, 1948 and sentenced to suffer R.I. for two years. All the afore-stated sentences were directed to run concurrently.

3. The facts in brief as are necessary for deciding the said Appeal are as follows:-

PW. 10-Dilip Wadekar was attached to the Oshiwara Police Station, as a PSI at the relevant time. He has stated that on 1st June, 1995, he received a telephonic message at 9.25 a.m. stating, that one dead body of a small girl was seen in a gunny bag at the ground of Pragat Vidya Mandir, Azad Nagar. On receipt of the said information, PW. 10-Dilip Wadekar communicated the same to his Superior and left the police station alongwith the police staff, after making an entry in the Station Diary.

PW10-Dilip Wadekar has stated, that when he reached the ground of Pragat Vidya Mandir, he saw that a large number of people had gathered and that there was a gunny bag lying on the ground which was stuffed with the dead body of a small girl. He has stated that one person came forward and disclosed his name as Dattaram Shankar Jagtap (PW. 1) and as being the same person, who had informed the police on telephone about the same. Pursuant to the said information, PW. 10-Dilip Wadekar recorded the First Information Report of PW. 1-Dattaram Shankar Jagtap (Exhibit-7) and accordingly C.R. no. 360 of 1995 came to be registered with the Oshiwara Police Station alleging offences punishable under Sections 302, 201 of the Indian Penal Code, as against an unknown person.

After registration of the offence, PW. 10-Dilip Wadekar drew the spot panchanama, seized the gunny bag, one blue coloured lungi and one pink colour shirt, collected plain soil and blood stained soil, lying near the dead body under a panchanama, being Exhibit-11. As PW. 10-Dilip Wadekar found injuries on the forehead, throat and private parts of the dead body, he sent the dead body for postmortem examination after filling up the ADR form. The said ADR form was marked as Exhibit-16A. He has further stated, that after completing the panchanama and sending the dead body for postmortem, he went to the police station and accordingly made an entry in the Muddemal Register of the articles seized. PW. 10-Dilip Wadekar, thereafter recorded the statement of Jairam Pujari-PW. 4 and other witnesses. PW. 10 Dilip Wadekar also produced a copy of the missing complaint, which was filed at the D.N. Nagar Police Station with regard to the missing of the deceased girl and the same was marked as Exhibit-32. Thereafter, PW. 10-Dilip Wadekar, handed over further investigation of the said case to PI-Iqbal Bargir (PW. 11).

PW. 11-Iqbal Bargir has stated, that he too was present with P.S.I. Dilip Wadekar (PW. 10) at the spot when the dead body was found in a gunny bag. He has stated that he recorded the statements of Shanti Aarsu Harijan, mother of the deceased and Shankar Konda (PW. 7) on the spot. Thereafter, he arrested the appellant on 1st June, 1995 at around 6.15 p.m. from Malad and accordingly made a station diary entry to that effect. The appellant was sent for his medical examination to the Nagpada Police Hospital on the same day.

PW. 11-Iqbal Bargir has stated, that on 3rd June, 1995 at about 5.00 p.m., the appellant made a disclosure statement showing his willingness to produce a knife and a stone. The same is marked as Exhibit-14. Pursuant to the said statement, the appellant alongwith the panchas and the police staff is stated to have proceeded towards the Sitladevi Temple, D.N. Nagar, Andheri and the Appellant is alleged to have produced a blood stained knife and stone from a place near a building. The said articles came to be seized alongwith dried grass in the presence on the panchas. The said panchanama is at Exhibit-14A and the articles, stone and knife are shown as Articles 10 and 11 respectively.

On 4th June, 1995, PW. 11-Iqbal Bargir recorded the statement of Sharda (PW-9), maternal aunt of the deceased. He also requisitioned the services of SEM Ashok Khade, for conducting a Test Identification Parade and accordingly a Test Identification Parade was conducted on 11th June, 1995. In the said Test Identification Parade, PW. 4-Jairam Pujari is alleged to have identified the said appellant. The Memorandum of Test Identification Parade is exhibited vide Exhibit-9. PW. 11-Iqbal Bargir has stated, that he sent the Muddemal articles to the chemical analyzer on 8th June, 1995 and the same were received back as six C.A. Reports, four reports dated 14th August, 1995, one report dated 2nd September, 1995 and one report dated 12th September, 1995. All the said C.A. Reports have been marked as Exhibits-31, 31A, 31B, 31C, 31D, and 31E respectively. On completion of the investigation, PW. 11-Iqbal Bargir submitted the charge sheet against the appellant in the Metropolitan Magistrate's Court.

3. On committal of the case to the Court of the Sessions, the Trial Court framed charges vide Exhibit-1, as against the appellant for the offences punishable under Sections 364, 376(2)(f), 302 and 201 of the Indian Penal Code and u/s 57 of the Bombay Children Act, 1948. The appellant pleaded not guilty and claimed to be tried.

4. The prosecution in support of its case examined 11 witnesses. The appellant contended that he was innocent and had been falsely implicated in the said case. The Trial Court after considering the evidence on record adduced by the prosecution, convicted the appellant for the offences punishable under 364, 376(2)(f), 302 and 201 of the Indian Penal Code and u/s 57 of the Bombay Children Act, 1948 vide Judgment and Order dated 19th April, 2000 and sentenced them to imprisonment as afore-stated in para. 2.

5. The appellant challenged the said Judgment and Order of conviction and

sentence, in this Court, by preferring Criminal Appeal No. 602 of 2000 and this Court vide its Judgment dated 7th September, 2006 was pleased to quash and set aside the Judgment and sentence of conviction and acquitted the appellant of all the afore-stated offences. The principal ground on which the appellant came to be acquitted was, that during the pendency of the appellant's Appeal, the Investigating Officer who had conducted the investigation, had left a suicide note stating therein, that he had falsely implicated the appellant in the offence at the behest of his superiors.

6. Against the Judgment dated 7th September, 2006, the State of Maharashtra preferred Criminal Appeal No. 1629 of 2007 in the Supreme Court, challenging the acquittal of the appellant. The Supreme Court, vide its order 24th January, 2013 was pleased to set aside the Judgment dated 7th September, 2006 passed by this Court and remitted the matter back to this Court with a direction to hear the matter afresh and to consider the case in accordance with law on the basis of the evidence adduced by the prosecution.

7. In order to effectively deal with the submissions canvassed before us by the learned counsel for the appellant and the learned APP, it would be useful to refer to the evidence of the prosecution witnesses.

8. PW. 1-Dattaram Jagtap has stated that on 1st June, 1995 at around 9.00 a.m. on the way for his duty, when he reached Pragat Vidya Mandir, Azad Nagar, Andheri, he noticed that a mob was standing there. On going near the mob, he saw that there was a blood stained gunny bag containing the dead body of a girl lying on the ground. He has stated, that he noticed a blood stained blue lungi and a pink coloured shirt lying near the gunny bag. He immediately contacted the Oshiwara Police Station on telephone, pursuant to which the police arrived at the spot and recorded his statement, which was treated as the First Information Report (Exhibit-7). PW. 1-Dattaram Jagtap has identified the said gunny bag, lungi and shirt as being articles 1, 2 and 3 respectively. He has further stated that throat of the girl was slit and there was an injury on her forehead and her private parts. Nothing substantial was elicited in the cross-examination of PW. 1-Dattaram Jagtap so as to disbelieve his evidence with regard to finding of the dead body of a girl from a gunny bag from the spot.

9. The prosecution has examined PW. 4-Jairam Pujari, a resident of that area, who had allegedly seen the appellant on the night of 1st June, 1995 with a gunny bag. PW. 4-Jairam Pujari has in his evidence stated, that he is a resident of Azad Nagar, Andheri (West) and was residing at a tea stall in the Azad Nagar area and used to ply an auto-rickshaw. He has stated, that on 1st June, 1995 when he was sleeping at the tea stall, at around 2.00 a.m. he heard dogs barking, as a result of which he woke up and saw one person going with a stuffed gunny bag on his shoulder towards the ground. He has stated that the said person was wearing a lungi and a shirt and as he felt that the person was carrying garbage in the gunny bag, he went back to sleep. PW. 4-Jairam has further stated that on 1st June, 1995 at about 10.00 a.m., as he noticed a large number of people on

the ground, he went there and saw that a body of a small girl was kept in a gunny bag and that one lungi and shirt were lying near the body. He has stated, that he informed the police about having seen one person in a lungi and shirt carrying a stuffed gunny bag at about 2.00 a.m. Accordingly, his statement was recorded by the police. He has further stated, that on 10th June, 1995, he was called by the police for identifying the accused in the said case and that he identified the Appellant in the police station amongst seven persons who were made to stand along with the appellant. The said witness has identified the articles i.e. gunny bag, lungi and shirt which he has alleged to have seen that night on the person. It is elicited in the cross examination of PW. 4-Jairam, that he had seen the person carrying the gunny bag from behind and that many persons carrying garbage pass from there.

10. PW. 7-Shankar Konda has stated that he was a resident of Azad Nagar area, Andheri (West) and that he knew the appellant, as he used to sleep in their locality. He has stated, that on 1st June, 1995 he learnt, that one small girl had been killed and therefore went towards the ground where the dead body was lying. On going near the dead body, he saw that there was a dead body of a small girl in a gunny bag and that the police had come there. He has stated that a blood stained lungi and a pink coloured shirt were lying near the dead body and that the dead body was that of the daughter of one Aarsu Harijan. PW. 7-Shankar Konda has identified the said lungi and shirt as clothes worn by the appellant when he was sleeping in their locality. However, this witness when shown the lungi and shirt, (articles 2 and 3) for identification, has stated that he does not remember whether the shirt was the same as seen on the person of the appellant. It is elicited in the cross-examination of this witness, that similar lungis are available in the market and worn by several other persons.

11. PW. 9-Sharda, aunt of the victim girl has stated that her sister Shanti alongwith her husband and four children were residing with her at D.N. Nagar, Andheri. She has stated that on 1st June, 1995, all the family members were sleeping outside the hut, in front of the Sitladevi Temple, D.N. Nagar, Andheri. She has stated that around 4.00 a.m. when her sister-Shanti woke up, she found that the victim girl was missing. Accordingly, they all searched for the girl, but as she could not be traced, they went to the police station and lodged a missing complaint with the D.N. Nagar Police Station at 6.00 a.m. PW. 9-Sharda has further stated, that on 1st June, 1995 at around 9.00 a.m. they received a message, stating that they should go to the Azad Nagar ground. Accordingly, the family members went to the ground and saw the victim girl in a gunny bag. They noticed injuries on her face, head and body and that she was dead. She has stated that she had noticed one lungi and shirt in the gunny bag along with the dead body of the victim girl and that the clothes were blood stained. She has further stated that she had seen one man in this shirt and lungi in their locality. She has identified the appellant as being the person and has identified the clothes i.e. lungi and shirt as being on the person of the appellant. In her cross examination, PW. 9-Sharda has categorically stated that the clothes i.e. lungi and

shirt were lying in the gunny bag and that when her statement was recorded, the police had showed the appellant to her in the police station and had disclosed his name as being Armogam Munnaswami Kounder. She has further admitted that it is true that many men wear blue lungi.

12. The prosecution has examined PW. 2-Ashok Khade, Special Executive Magistrate who conducted the Test Identification Parade on 11th June, 1995. He has stated that he conducted the Test Identification Parade in the Crime Protection Room in the Oshiwara Police Station on 11th June, 1995 between 11.15 and 12.25 p.m. in the presence of the panchas. He has stated that PW. 4-Jairam had identified the appellant. He has proved the memorandum of Test Identification Parade which is exhibited vide Exhibit-9. In his cross-examination, the said witness has admitted that the said room where the Test Identification Parade was conducted was the room of the Police Officer.

13. PW. 6-Dr. Rajaram, who had conducted the postmortem on the deceased girl, noticed several external injuries on her forehead, throat and private parts. He opined, that the cause of death was due to fracture of the skull due to sexual assault. He has stated that the injuries were sufficient in the ordinary course of nature. He has also stated that the injury nos. 9, 10 and 11 in column no. 17 were possible by a sharp edged weapon like article 11-knife and injury nos. 1, 2, 3, 4, 6 and 7 in column no. 17 were possible by article 10-stone. The said postmortem report has been exhibited vide Exhibit no. 16.

14. The appellant was also sent for medical examination after his arrest and was examined by PW. 8-Dr. Shinde. PW. 8-Dr. Shinde has in his evidence stated, that he was attached to the Nagpada Police Hospital as a Medical Officer and that on 1st June, 1995, the appellant was brought to him for his medical examination, by a Head Constable of the Oshiwara Police Station. On examination, PW. 8-Dr. Shinde did not find any external injuries on the Appellant. He collected the blood, nail clippings and glance washings of the appellant and handed over the same to the Head Constable who had accompanied the appellant. The report of the Medical Examination of the appellant is marked as Exhibit-21. PW. 8-Dr. Shinde has stated, that the appellant gave history to him, stating; that he had taken the victim girl from the footpath when she was sleeping besides her mother at about 3.00 a.m. on 1st June, 1995 to a open gutter nearby; that he had cut the external genitals of the girl with a blade and had sexual intercourse with the deceased victim girl; later slit her throat with the same blade and put her in the gunny bag and placed the gunny bag in the open place near the building. The said history allegedly stated by the appellant is part of Exhibit-21.

15. The prosecution has examined PW. 5-Dubey to prove the recovery of knife and stone at the instance of the appellant. PW. 5-Dubey has stated, that on 3rd June, 1995 he was called by the Oshiwara Police and the appellant had in the presence of the panchas made a disclosure that he would show the place and would produce a knife and stone and accordingly signed the memorandum (Exhibit-14). He has further stated, that pursuant to the memorandum, the

appellant alongwith the panchas and police staff went near the Sitladevi Temple, D.N. Nagar, Andheri by jeep from where the appellant allegedly pulled out the knife from the grass. It was a blunt kitchen knife with a wooden handle and its blade was blood stained. The Appellant, is thereafter alleged to have taken them near a compound wall near the ground and produced a stone. Pursuant to the said discovery, the police seized the knife and stone, prepared the panchanama being Exhibit-14A. PW. 5-Dubey, has identified the knife and the stone.

16. Learned Counsel Mr. Tangsali has canvassed before us that:- (i) that the prosecution case rests on circumstantial evidence and the circumstances brought on record are not sufficient to convict the appellant; (ii) that the evidence of identification of the Appellant only on the basis of the clothes is extremely weak and untrustworthy; (iii) that the recovery of knife and stone at the instance of the appellant is suspicious and suffers from several infirmities; (iv) that the extra judicial confession allegedly made to PW. 8-Dr. Shinde is not an extra judicial confession.

17. The learned APP Smt. Kejriwal, has contended that the Judgment of the Trial Court is legal and proper and ought not to be interfered with and as such supported the conviction of the appellant.

18. After giving our anxious consideration to the submissions advanced by the learned counsel for the appellant and the learned APP and after going through the evidence, we find that the prosecution has although proved that the victim-girl died a homicidal death, has not been able to prove that it was the appellant and the appellant alone who was responsible for the same.

19. As far the evidence of PW. 4-Jairam is concerned, the said witness had seen the Appellant from behind carrying a gunny bag at 2.00 a.m. at the night. Considering the evidence that has come on record, that he allegedly woke up from his sleep as dogs were barking and saw one person from behind, carrying a gunny bag on his shoulder, it appears highly doubtful as to whether this witness had really seen the appellant that night i.e. on 1st June, 1995 at 2.00 a.m. PW. 4-Jairam has stated, that, he had seen one person going with a stuffed gunny bag on his shoulder going towards the ground and that person was wearing a lungi and shirt. The said witness in his cross examination has admitted that he had seen the person carrying the "gunny bag from behind". In the light of the said admission, it would be extremely unsafe to place any reliance on the identification of the appellant only on the basis of a lungi and shirt and that too at 2.00 a.m. in the night. There is also nothing on record to show, that he knew the Appellant or that there was light in the vicinity so as to enable him to identify the Appellant only on the basis of the clothes.

20. With regard to the identification of the appellant in the Test Identification Parade on 11th June, 1995, by PW4-Jairam which was conducted by PW. 2-Ashok Khade vide Memorandum Exhibit-9, the same cannot be accepted in as much as it was held in the precincts of the police station and therefore the Test

Identification Parade will have to be discarded.

21. As far as PW. 7-Shankar Konda's evidence is concerned, he has only identified the lungi as being that of the appellant. He has further admitted in his cross examination that there are several such lungis and shirts which are available in the market and worn by the persons in the vicinity. The said witness had not seen the appellant on the night of the incident, and as such in the light of the evidence on record, identification of the Appellant only on the basis of clothes allegedly worn by him cannot be even remotely stated to be an incriminating.

22. Curiously, we find that the prosecution has not adduced any evidence either of the victim girl's mother or any other member of the family, apart from PW. 9-Sharda to show, as to when and with whom the girl was last seen. In the absence of any evidence that the Appellant was last seen with the victim girl, it will be extremely hazardous to place any reliance, much less implicit reliance on the identification of the Appellant, only on the basis of his clothes i.e. lungi and shirt.

23. As far as the recovery of a blunt kitchen knife and stone at the instance of the appellant is concerned, we find that the said recovery is doubtful. The evidence of PW. 5-Dubey, the panch to the recovery of the knife and stone at the instance of the appellant has stated, that the appellant pursuant to his disclosure statement showed the place where the knife and stone were kept. It is pertinent to note that the panchanama, Exhibit-14A does not mention that the articles were sealed after they were seized. The articles which were recovered were from an open place, accessible to all and as such the recovery evidence appears to be doubtful and not free from suspicion.

24. The other evidence relied upon by the prosecution is the alleged extra judicial confession made to PW. 8-Dr. Shinde. According to the prosecution, when the appellant was brought for medical examination, he allegedly gave history; that he had taken the victim girl from the footpath when she was sleeping besides her mother at about 3.00 a.m. on 1st June, 1995 to a open gutter nearby; cut the external genital of the girl with a blade and had sexual intercourse with the deceased victim girl; and thereafter cut her throat with the same blade and put her in the gunny bag and placed the gunny bag in the open place near the building. The said history stated by the appellant is part of Exhibit-21, i.e. the case paper of the medical examination of the Appellant.

25. A perusal of the history allegedly given by the appellant appears not only doubtful but the same is also clearly inadmissible in law, in as much as, it is hit by Section 26 of the Indian Evidence Act. Section 26 of the Indian Evidence Act reads thus:-

26. Confession by accused while in custody of police not to be proved against him.-No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be

proved as against such person.

Explanation.-In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George [***] or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 (10 of 1882).

26. Therefore, in view of the mandate of Section 26 of the Evidence Act, a confession by an accused while he is in the custody of the police shall not be proved against the accused unless it is made in the immediate presence of the Magistrate.

27. The evidence on record clearly shows, that the appellant after his arrest, was in the custody of the police when he was taken for his medical examination, by the Head Constable to PW. 8-Dr. Shinde. The question therefore is, whether the appellant made the extra judicial confession while he was in police custody. Although, PW. 8-Dr. Shinde has stated, that the Head Constable was not present during the medial examination, it is incomprehensible that the appellant would have been left alone with the doctor considering the fact that he was arrested in connection with a serious and gruesome offence. It is obvious that with a view to avoid the rigours of Section 25 and 26 of the Evidence Act, that PW. 8-Dr. Shinde has stated, that when the appellant gave history, the police officer was not present. Neither, the police Head Constable of Oshiwara Police Station has been examined by the prosecution nor was there anything to prevent the Investigating Officer from taking the appellant to the Judicial Magistrate for having his confession recorded as provided u/s 164 of the Code of Criminal Procedure. It is incredulous to believe, that for mere asking history by PW. 8-Dr. Shinde, the appellant voluntarily confessed to him. In the light of the evidence that has come on record, it would be legitimate to conclude, that after the appellant's arrest on 1st July, 1995 at about 6.15 p.m. he was in police custody and that he was taken for his medical examination by the head constable to Nagpada Police Hospital, where he was examined by PW. 8-Dr. Shinde. In the light of the afore-stated evidence, we cannot accept the said evidence, as the alleged extra judicial confession made to PW. 8-Dr. Shinde is clearly hit by Section 26 of the Evidence Act and would have to be excluded from consideration.

28. As far as the C.A. reports are concerned, it appears that the shirt and lungi were blood stained and that the report showed that it was human blood. However, since we have disbelieved the fact, that the lungi and shirt belonged to the appellant, the C.A. report would not be of much assistance.

29. No doubt the manner in which the victim girl was done to death was cruel and gruesome, but we cannot be oblivious to the fact that being a case resting on circumstantial evidence, it was incumbent for the prosecution to establish each and every circumstance on which it proposed to rely. The circumstances so established should be of a conclusive nature and should have a definite tendency of implicating an accused. The circumstances so proved should form a complete

chain which should exclude every hypothesis of the innocence of the accused and should unerringly point to the guilt of the accused. In other words, the circumstances so established should be capable of only one conclusion i.e. that the accused and the accused alone has committed the murder. In the present case, the circumstances adverted to by us do not form a complete chain and do not exclude the hypothesis of innocence of the Appellant and under no circumstance proves the guilt of the appellant beyond reasonable doubt. According to us, therefore, as the prosecution has failed to prove that it is the Appellant and the appellant alone who was responsible for the alleged offence, the Appellant is entitled to be given the benefit of doubt. In the premise, Criminal Appeal is allowed and the conviction and sentence of the Appellant is hereby quashed and set aside and the Appellant is acquitted of the offence with which he was charged and convicted. Fine, if paid by the Appellant, be refunded to him. Bail bonds, if executed by the Appellant, stands cancelled.