
(2007) 09 BOM CK 0006
In the Bombay High Court
Case No : Criminal A. No. 732 of 2005

Babasaheb Thombre

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 27-09-2007

Acts Referred:

Evidence Act, 1872 — Section 105
Penal Code, 1860 (IPC) — Section 302, 84

Citation : (2008) CriLJ 2935

Hon'ble Judges : S.P. Kukday, J; P.V. Hardas, J

Bench : Division Bench

Advocate : S.S. Thombre, for the Appellant; N.H. Borade, APP, for the Respondent

Final Decision : Dismissed

Judgement

S.P. Kukday, J.—The appellant is found guilty of committing murder of his wife Sanjivani on 20th April 2004, by Additional Sessions Judge, Majalgaon. He is convicted for committing offence punishable u/s 302 of the Indian Penal Code and is sentenced to suffer imprisonment for life. This order of conviction and sentence dated 31st August 2005 is impugned in the present appeal.

2. Appellant married Sanjiwani (deceased) in the year 1987. Vijay (aged 18 years), Ashwini (aged 14 years) and Vinod (aged 11 years) were born within the wedlock. The appellant was serving in Police Department and was living in Police Colony at Jalna. He was addicted to liquor and was in the habit of assaulting his wife and suspecting her chastity. On 19th April 2004, appellant stopped at the parental house of the Sanjivani at Chinchwan with his wife and children on route to his native place Wadmawali Dahiphal. Sanjivani had spoken of her visit to her sister Ashrabai (P.W. 2) on telephone from Jalna; thus Ashrabai had come to Chinchwan with her husband Vitthal. Sanjiwani's brother Vishnu Ramkisan Tambade (P.W. 1), who is practising medicine at Dindrud, had also come to Chinchwan for domestic work with his wife Manisha. In the evening Sanjivani

acquainted her brother and sisters that her husband is subjecting her to beating and suspects her chastity. After the evening meals, appellant slept on the cot in the western room. Vishnu slept on the floor near the cot, Sanjivani, Ashrabai and Vinod slept on the carpet. Others were sleeping in the eastern room. At about 1.00 o'clock in the night Vishnu and other members of the family awoke on hearing cries of Sanjivani for help. They saw that Sanjivani had suffered bleeding injuries on head and face. The appellant was about to inflict another blow on the deceased with axe saying that he wants to kill Sanjivani. Vishnu snatched axe from the hands of the appellant and bandaged injuries of Sanjivani to stop the bleeding. Sanjivani was then taken to Vithai hospital. After giving first aid the doctor advised Vishnu to take the patient to Civil Hospital at Beed, as the injuries were serious. At the Civil Hospital Sanjivani was declared dead at about 3.25 a.m. The medical officer conveyed information about the death of Sanjivani to the in charge of the Hospital Chowky (Ex. 46). On receipt of this information, ASI Haribhau Jadhav (P.W. 4) held inquest (Ex. 32) on the dead body, sent it for the postmortem and recorded complaint of Vishnu (Ex. 39). During autopsy Dr. Deelip Soundale (P.W. 3) found that the deceased had sustained three external injuries, (i) Incised wound extending from right temporal region to right parotid area of the size of 10 x 5 x 7 cms. (ii) Incised wound oblique in direction cutting right pinna in upper 1/3rd with fracture of mandible and cutting of the muscles and vessels, (iii) fracture of occipital bone. Internal examination disclosed damage to muscles and vessels due to cutting with laceration of cerebellum and cerebrum. Digested food with half litre of fluid, was found in the intestine. The autopsy surgeon prepared postmortem report (Ex. 44) giving cause of death as shock due to the head injury with laceration of the brain.

3. On completion of the formalities, Beed Police forwarded the papers to Dharur Police. PSO Dharur Police Station registered offence against the appellant u/s 302 of the Indian Penal Code and handed over the investigation to PSI Kashinath Adhe (P.W. 6). The investigating officer visited the scene of the occurrence on the next day. He attached axe and carpet stained with blood, under Panchanama (Ex. 35) and sent the articles attached during the investigation to the Forensic Laboratory. After completion of the investigation, Charge Sheet was submitted against the appellant.

4. In the trial Court as well as before us, the appellant did not dispute the incident. He adopted plea of legal insanity, claiming benefit of exception u/s 84 of the Indian Penal Code. Vishnu (P.W. 1), Ashrabai (P.W. 2) and Aswani (P.W. 5) narrated prosecution version of the incident. In addition Ashwini referred to the addiction of her father to liquor and his quarrels with her mother. During their cross examination it is brought on record that on 7th July 2002, the appellant had jumped from first floor of the Office of Superintendent of Police. They, however, repelled the suggestions that the appellant had slept in the middle of the road while on duty, that he had placed his feet on the burning electric heater or that he was taking treatment for insanity from the psychiatrist at Aurangabad.

5. Dr. Vinay Barhale (D.W. 1) of Shanti Nursing Home, stated that he was treating the appellant from 31st January, 2003, Dr. Vinay stated that the appellant was addicted to liquor. He had a history of hearing voices of the people, suspecting chastity of his wife, aggressive behaviour and delusion that the people are likely to cause harm to him. From these symptoms he diagnosed the patient to be schizophrenic. Dr. Vinay has proved case papers of the appellant (Exs. 63 to 66). In the cross examination the doctor mentioned that uncle of the appellant was suffering from mental disease. The doctor admitted that he did not feel it necessary to advice detention of the appellant for observation and treatment.

6. Mother of the appellant, Jankabai (D.W. 2) stated that appellant was behaving like a lunatic while he was admitted to Civil Hospital at Aurangabad after he jumped from the first floor of his office. She further stated that the deceased had informed her on telephone that her son had set fire to quilt wrapped around him, that he had kept his feet on the electric heater and had slept on the public road. In the cross examination, Jankabai admitted that in her presence her son did not behave like a lunatic. She, however, denied that her son was addicted to liquor and fallen from the first floor of his office on account of intoxication.

7. Vinayak Tidke (D.W. 3) a co-prisoner stated that speech of the appellant used to be irrelevant and his behaviour in the prison was queer. The witness admitted that behaviour of the appellant was normal after he was handcuffed.

8. On appreciation of evidence, the Sessions Judge found that the appellant was in full control of his mental and physical faculties before, at and after the commission of the crime. He further found that case of the appellant is not covered by exception provided by Section 84 of the Penal Code. In conformity with this finding the Sessions Judge rejected the defence of insanity, convicted the appellant of the murder of his wife and sentenced him as stated earlier.

9. Shri. S.S. Thombre, learned Counsel for the appellant canvassed plea of insanity before us. According to the learned Counsel evidence of Dr. Vinay, coupled with the admission that the appellant had previous history of queer behaviour of jumping from the first floor of the office; does establish that the appellant was suffering from schizophrenia. Learned Counsel urged that no sane person would assault his wife without any reason at her parental house, in a room where her brother and sister were sleeping. The nature of the act itself, indicates that the behaviour of the appellant was irrational. According to learned Counsel the fact that appellant acted irrationally coupled with the fact that he was suffering from schizophrenia, does show that the appellant had lost control over his faculties and did not know the consequences of his act. The evidence on record is sufficient to bring his case within the ambit of exception u/s 84 of the Indian Penal Code. In support of his contentions learned Counsel relies on the decision of the Supreme Court in Dahyabhai Chhaganbhai Thakker Vs. State of Gujarat, .

10. Per contra, learned APP Shri N.H. Borade would support conviction of the appellant on the premise that the act of killing was intentional.

11. For appreciating the points raised by learned Counsel Shri Thombre, we may advert to the principles applicable to a case where plea of insanity is adopted by the accused. The law presumes every person to be sane and holds him responsible for his acts. Criminal liability arises if the offending act is done with requisite mens rea. If the accused pleads that his case falls under any of the exceptions to the general rule provided by Chapter IV of the Indian Penal Code, the burden to establish that his case is covered by an exception lies on him. In the present case as the appellant has pleaded legal insanity, in order to establish his defence the appellant must satisfy the test prescribed by Section 84 of the Penal Code. Section 84 provides that nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law. The question whether the appellant has discharged this burden has to be determined on appreciation of the totality of the circumstances. In order to establish plea of legal insanity the appellant has to prove that at the time of the commission of the act he was labouring under such a defect of reason, in view of the disease of mind, that he was incapable of knowing nature of the act he was doing or that what he was doing was either wrong or contrary to law. It is only the unsoundness of mind which materially impairs cognitive faculties of mind can furnish a ground for exemption from criminal liability, the nature and extent of unsoundness of mind required being such as would make him incapable of knowing that the act which he performed was either wrong or contrary to law. Acts prompted by extreme anger or frenzy or done in the state of intoxication or uncontrollable impulse, cannot absolve the accused of the criminal liability of his acts if he knows what he is doing is wrong or contrary to law. It is not every mental derangement that exempts an accused from criminal responsibility of his acts, only the derangement which impairs his cognitive faculties making him incapable of understanding the nature of his acts is covered by Section 84. The state of mind of the accused at the time of the commission of the offence is material for the decision of the issue. For this purpose, it is permissible to consider the behaviour of the accused prior to, at the time of and after commission of the offence till the commencement of the trial. Opinion of an expert that the accused was suffering from a particular mental disease is relevant for deciding whether the accused was in fact suffering from mental disability at the time of the commission of the offence but cannot be treated as conclusive of this fact as the question to be decided involves determination of the truth of the facts deposed to by the witnesses. The medical opinion can only assist the Court to come to proper conclusion which has to be arrived at by consideration of the circumstances in which the offence is committed.

12. We accept arguments advanced by learned Counsel Shri Thombre on the point of requirements of law envisaged by Section 84 of the Penal Code and Section 105 of the Evidence Act, for proving legal insanity and nature of burden

of proof which the offender must discharge. Section 105 of the Evidence Act is an exception to the general rule that, the burden to prove guilt of the accused beyond doubt is on the prosecution. Section 105 provides that burden of proving existence of circumstances bringing his case within any of the General Exceptions shall be on the accused. The Section further provides that the Court shall presume absence of such circumstances. The initial burden to prove guilt of the accused beyond reasonable doubt is always on the prosecution and never shifts. The burden to prove that his case is covered by statutory exception shifts on the accused only after the initial burden is discharged by the prosecution. This burden is not as onerous as the burden lying on the prosecution to prove the guilt beyond reasonable doubt. The accused can discharge his burden by relying on the evidence on record or prove his case by preponderance of probabilities. Even if the accused fails to discharge this burden cast upon him by Section 105, but succeeds in establishing circumstances which are consistent with his innocence, he would be entitled to an acquittal not because he has established his innocence but because the prosecution has failed to prove his guilt beyond doubt. For the proposition that the accused can establish his innocence by preponderance of probabilities learned Counsel Shri Thombre has rightly placed reliance on the decision of the Apex Court In *Dahyabhai Chhaganbhai Thakker Vs. State of Gujarat*, . Laying down the law on the point. Their Lordships observed that the accused has to place sufficient material on record to establish existence of circumstances necessary to rebut the initial presumption of sanity by the standard of the prudent man. If the material placed on record, including oral or documentary evidence, presumptions, admission or even the prosecution evidence, satisfies the test of a prudent man, the accused must be taken to have discharged his burden. Explaining the import of the doctrine of burden of proof it is observed in para 7 of the report:

The doctrine of proof in the context of the plea of legal insanity may be stated in the following positions: (1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with requisite mens rea, and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. (2) There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by Section 84 of the Indian Penal Code: the accused may rebut it by placing before the Court all the relevant evidence oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings. (3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the Court by the accused or by the prosecution may raise a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the Court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged.

The controversy in the present case will have to be decided by application of

these principles.

13. Main plank of the argument of learned Counsel Shri Thombre is that the medical evidence of Dr. Vinay (D.W. 1) and the admitted fact that the appellant's behaviour was abnormal, shows that he was suffering from schizophrenia and did not understand nature of his act. On the superficial scrutiny this argument appears to be attractive, however, careful analysis of the material on record discloses that the evidence does not conclusively establish that the appellant is in fact suffering from schizophrenia or any other mental sickness. We have carefully scrutinized case papers at Exs. 63 to 66. The discharge card emphasizes addiction to liquor and remedial measures for getting rid of the addiction (Vyasan mukti). Prescriptions are at Ex. 64. Certificate (Ex. 65) which refers to schizophrenia is issued while the appellant was in magisterial custody after commission of the offence. Symptoms of delusion regarding infidelity of the wife, unnatural behaviour of the appellant are found only in case paper (Ex. 66) which gives date of admission as 31st of January 2003. However, these symptoms are not found in the discharge card (Ex. 63). The certificate does not specify type of schizophrenia from which the appellant was suffering. We have also noticed that Dr. Vinay, who is examined as an expert, has not proved his credentials. He is conspicuously silent about his qualifications. It is not shown that the expert is a psychiatrist who can authoritatively certify that the patient is suffering from a mental disease. Only proved instance of queer behaviour of the appellant is his jumping from the first floor of the office. After that he was treated by Dr. Vinay for addiction. It is not in dispute that the appellant was discharging his duty as a police constable since January 2001 till 19th April 2004. Thus, there is no evidence on record to justify diagnosis of schizophrenia. Even otherwise, the accused has to show that by reason of his insanity he was unable to understand that what he was doing was either wrong or contrary to law at the time of the commission of the offence. The conduct of the appellant during the relevant period would show that the appellant searched for the axe and launched murderous assault on his wife while all others were asleep. Even after inmates of the house awoke, when appellant heard groaning of his wife, he tried to inflict another blow, in presence of all the relatives, saying that he is determined to end her life. This conduct of the appellant at the time of the commission of the offence would show that he was in full control of his cognitive faculties. There is nothing to show that on the day of incident behaviour of the appellant prior to the incident was abnormal. There is also no evidence to show that till the commencement of the trial, behaviour of the appellant was abnormal while he was in magisterial custody. The defence did attempt to examine co-prisoner Vinayak Tidke (D.W. 3) to show that behaviour of the appellant was abnormal during his incarceration. The witness has, however, admitted during his cross-examination that after hand cuffing the appellant was behaviour properly. If in fact the appellant was required to be hand cuffed, his abnormal behaviour must have been noticed by the Prison Officials and he would have been sent for medical examination. In the absence from the prison record showing that the

appellant was suffering from mental disease, we do not find any fault with the decision of the Sessions Judge to discard evidence of the co-prisoner. Considering the totality of the evidence, in our considered opinion, the appellant was in full control of his cognitive faculties prior to, at the time of the commission of the offence and thereafter, till the commencement of the trial.

14. On consideration of the entire evidence in proper perspective, in our considered opinion, the appellant was suffering from the addiction to alcohol. At the time of the commission of the offence he was not suffering from any mental disease and was in full control of all his cognitive faculties prior to, at the time of and after the commission of the offence.

15. The appellant has, thus, failed to establish that he was unable to comprehend nature and consequence of his act at the time of the commission of the offence. In the face of the evidence on record we are unable to persuade ourselves to subscribe to the theory propounded by learned Counsel Shri Thombre that, by reason of the mental disease, the appellant did not know that what he was doing was wrong or contrary to the law at the time of commission of the offence. In the light of these facts, we do not find any fault with the conclusion of learned Sessions Judge that appellant caused death of his wife with requisite intention and is guilty of committing her murder. We, therefore, confirm the order of conviction and sentence passed by the Sessions Judge. Consequently, the appeal fails and is, accordingly, dismissed.