

(1988) 11 BOM CK 0046

In the Bombay High Court

Case No : Criminal Appeal No's. 65 and 66 of 1988

Babu Yedne

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 28-11-1988

Acts Referred:

Evidence Act, 1872 — Section 3
Penal Code, 1860 (IPC) — Section 302

Citation : (1990) 3 BomCR 320

Hon'ble Judges : P.V. Nirgudkar, J; Anant D. Mane, J

Bench : Division Bench

Advocate : P.G. Godhamgaonkar, for the Appellant; K.H. Dhuldhwaj, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

P.V. Nirgudkar, J.—These appeals are directed against the order of conviction and sentence recorded by the Additional Sessions Judge, Latur, in Sessions Case No. 44/1987.

2. This judgment would dispose of the two Criminal Appeals viz., Criminal Appeals Nos. 65/1988 and 66/1988.

3. In the aforesaid sessions case, appellant Babu was arrayed as accused No 2 and his father Nilkanth was arrayed as accused No. 1. It is alleged against them that they committed offences punishable under sections 302 and 201, both read with section 34 of Indian Penal Code, as, in furtherance of their common intention of both the accused, the accused No. 2 Babu committed murder of his mother Bhagirathabai by assaulting her with Warwanta on her head and thereafter both the accused threw away the dead body in a well near Railway Station, Udgir, and to cause evidence of murder to disappear.

4. In order to understand the prosecution case in a better manner and to avoid un-necessary repetition it would be useful to acquaint ourselves with the person

and places involved, connected and concerned in this case. These facts are undisputed or may be taken as proved by the evidence on record. These facts are ---

Bhagirathabai, the deceased, a lady of 50 years old, who is the victim of the assault and who suffered a tragic death, was the wife of Nilkanth, accused No. 1. Accused No. 2 Babu is the son of this Nilkanth and Bhagirathabai. The only and lonely witness P.W. No. 2 Vaishali is the daughter of accused No. 2 Babu and grand daughter of accused No. 1 Nilkanth and the deceased Bhagirathabai. It appears from the judgment of the learned Additional Sessions Judge that Meena wife of the accused No. 2, was also murdered by both the accused and the case seems to be pending. Vaishali is the daughter of Babu and Meena. Both the accused, Bhagirathabai and Vaishali were residing together in one of the rooms in the Wada of one Rukke at Udgir. The rough sketch of that Wada is available at Ex. 13 Page No. 27. A look at this sketch would clearly show that there is only one door or entry to this Wada and in the front there is a closed Osari with four rooms ; two on either side-two on the north and two on the south and there are two rooms on the west. All the rooms have been occupied by the tenants. It is the prosecution case that there is also evidence of the witnesses- P.W. No. 5 Paramabai, P.W. 6 Kamalbai and P.W. 9 Mangal that both the accused used to demand money from Bhagirathabai and with reluctance or with hesitation she used to part with money or ornaments or even utensils to meet their demands.

5. The ill-starred night was between 25th and 26th January, 1987, when Bhagirathabai slept by the side of Vaishali, perhaps not knowing that she will not see morning sun rise and tragic could be her death on that very night. It was happened, so is the prosecution case, that a little after midnight accused No. 2 Babu came into the room and started assaulting Bhagirathabai, the deceased, his mother, with werwanta (a stone used as grinder) on her head causing bleeding injuries resulting in fracture of frontal parietal part of the skull and causing extensive damage to the brain. Vaishali woke up due to the cries of Bhagirathabai but accused No. 2 Babu, telling her that he would carry her grand mother to the hospital, lifted Bhagirathabai on his back and went away. Vaishali went again to sleep and woke up in the morning only to be told by others that the body of her grand mother Bhagirathabai is floating in a well near Railway Station.

6. The villagers too came to know in the morning that Bhagirathabai's body is floating in the well. So, Accused No. 1 Nilkanth, runs the prosecution version further, claiming himself to be innocent, went to the Police Station, Udgir, and lodged a report (Ex. 30) that Bhagirathabai, his wife, left the house between 2 and 3 a.m. and committed suicide by taking a jump into the well as she was lunatic. A.S.I. Joshi who was kept incharge of enquiry of that report, came near the well, took out the dead body and prepared inquest (Ex. 10) at 2 p.m. on 26th January, 1987. He immediately sent the dead body to the Civil dispensary for postmortem examination and drew up the Panchnama of the well (Ex. 11). After

he received the Provisional Certificate of the cause of death of Bhagirathabai, he filed the first information report (Ex. 32) under sections 302, 202 read with section 34 of the Penal Code.

7. Further investigation was taken up by P.S.I. Shinde (P.W. No. 12). He went to the house of the accused and prepared spot panchnama (Ex. 20). He seized the warwanta, Barni, aluminium plate, aluminium cover of tin, bedsheet, shawl, all stained with blood (Muddemal Art. Nos. 1 to 6). He also found blood-stains on the ground and collected earth mixed with blood. He arrested accused No. 1 Nilkanth on the spot and seized his shirt and payjama as blood-stains were found on the clothes under panchnama (Ex. 27). On the next day, i.e. on 28th January, 1987, he arrested accused No. 2 Babu and seized his terricot pant and Nehru shirt from his person under panchnama (Ex. 22) as both these clothes have had blood-stains. He sent both the accused to the Medical Officer with a requisition memo to take their blood sample and to ascertain their blood group. The articles seized on the spot and those produced by constable as belongings of the deceased were sent to the Chemical Analyser in separate sealed packets and the report of the Chemical Analyser is at Ex. 36. The report shows that there were blood-stains of group 'A' found on the belongings of the deceased and on the Muddemal Articles 1 to 6 found on the scene of offence. On completion of necessary investigation, chargesheet was submitted against both the accused in the Court of Judicial Magistrate, First Class, Udgir.

8. As the offence punishable u/s 302 is exclusively triable by the Court of Sessions, the learned Magistrate committed the accused to the Court of Sessions, Latur.

9. Each accused pleaded not guilty to the charge and their evidence is of total denial. According to them, they had no hand either in the murder or in causing the evidence of murder to disappear. They pleaded ignorance of knowledge as to who caused death of Bhagirathabai and how the deceased fell into the well. It is their claim that the deceased might have committed suicide.

10. In order to bring home guilt to the accused, the prosecution examined 12 witnesses, out of whom, P.W. No. 2 Vaishali is a witness to the incident and P.W. No. 1 Dr. Sheshrao Yerolkar is a Medical Officer, Udgir, who carried out the post-mortem examination. P.W. No. 3 Vithal is a panch witness who proved another panchnama (Ex. 20). P.W. No. 4 Manmath Swami has proved another panchnama Ex. 22 under which clothes of the accused No. 2 Babu were seized. The third Panch is P.W. No. 8 Govind who swears and proves panchnama (Ex. 27) under which the clothes of accused No. 1 Nilkanth were seized. The prosecution has also examined P.W. No. 5 Paramabai, P.W. No. 6 Kamalbai and P.W. 9 Mangal to show that accused were demanding money and ornaments from the deceased. P.W. No. 11 and P.W. No 12 as stated above, are Investigating Officers and while narrating the prosecution case we have already referred to the part played by them. This is, in short, the nature of the evidence tendered by the prosecution.

11. The defence has not led only evidence.

12. On consideration of the prosecution evidence the learned Additional Sessions Judge came to the conclusion that the evidence of Vaishali is reliable and supported by additional circumstantial evidence and so he convicted accused No. 2 Babu of murder, an offence punishable u/s 302, and sentenced him for imprisonment for life. He also found accused No. 1 Nilkanth guilty of offence u/s 201 of the Penal Code and sentenced him to suffer rigorous imprisonment for seven years and to pay fine of Rs. 500/- or in default, to suffer further rigorous imprisonment for one year. Aggrieved by this order of conviction and sentence both the accused have filed separate appeals and, as already stated and indicated, this judgment would dispose of both these appeals.

13. The fact that Bhagirathabai suffered homicidal death would not detain us for a long because formidable is the medical evidence on this point. Dr. Sheshrao Yerolkar (P.W. No. 1), Medical Officer, Udgir, who carried out the post-mortem examination between 9 a.m. and 10.30 a.m. on 27th January, 1987, found following external injuries.

"(1) Confused lacerated wound on the frontal parietal part of the scalp, centrally irregular about 4" x 2" bone deep with compound fracture of frontal and parital bones of skull.

(2) Confused lacerated wound on the scalp infront of the first wound about 1 1/2" x 1" scalp deep.

He also found on internal examination, that there was fracture of the frontal parietal part of the skull, about 3" x 1 1/2" x brain deep and that injury, according to Dr. Yerolkar, is corresponding to the external injury No. 1. He also noticed that there was extensive damage to the brain due cavity and the lungs were found congested and on cut section reddish forth was found on squeezing. He opined that death was due to shock and damage of brain due to fracture of skull and also because of asphaxia due to the drowning. He has further stated that the injuries suffered on the head were sufficient in the ordinary course of nature to cause death. There was nothing or little in the cross examination of the Medical Officer to discredit his evidence or his post-mortem report and in our opinion the learned Additional Sessions Judge was justified in recording a finding that Bhagirathabai suffered homicidal death. Agreeing with this view and with his opinion we proceed further.

14. The crucial question on material point to be considered is whether the accused No. 2 Babu is the assailant of the deceased i.e. to say whether he caused the death of the deceased. This is the heart of the problem and meat of the matter. The entire prosecution case rests on the sole testimony of Vaishali (P.W. No. 2) a minor girl of tender years, aged eight. This Vaishali is closely related to both the accused as well as to the deceased. She is the daughter of accused No. 2, the alleged assailant and grand child of accused No. 1 Nilkanth and deceased Bhagirathabai. She has testified that when she and Bhagirathabai

were sleeping on the cot in the room accused No. 2 beat the deceased with warwanta and on hearing alarm and cries of Bhagirathabai she got up and saw the accused assaulting Bhagirathabai with warwanta on her head. Thereafter, says Vaishali further, accused lifted injured Bhagirathabai on his back and telling that he would carry Bhagirathabai to the hospital, went out of the room. Thereafter, so runs Vaishali's version further, she again went to sleep and when she got up in the morning she was told by Nagnath that Bhagirathabai her grand mother, fell into a well and when she went to that well near Railway Station, she found to her shock and horror, that Bhagirathabai her grand mother-was dead.

15. This is, in short, the evidence of Vaishali which the learned Additional Sessions Judge has accepted and we have to see whether the learned Additional Sessions Judge was justified in accepting that evidence unhesitatingly. Shri Godhamgaonkar, who has been appointed in both these appeals as amicus curiae has argued with vehemence that the learned Additional Sessions Judge has fallen into error in placing reliance on the testimony of Vaishali. According to Shri Godhamgaonkar the evidence of this child witness needs corroboration in law as it otherwise suffers from infirmity and there is no satisfactory corroboration. Shri Godhamgaonkar has offered some caustic comments on the appreciation of the evidence by the learned Additional Sessions Judge and pointed out that he misread the evidence of Vaishali and ignored the improbabilities springing from this child witness. He further brought to our notice that if Vaishali had really seen the incident she would not have acted in the manner in which we are told that she had acted and so the conclusion of the learned Additional Session Judge, so argued Shri Godhamgaonkar , that the witness Vaishali is not a tutored witness, is not acceptable. We now proceed to consider how far the criticism of Shri Godhamgaonkar is legitimize and well-founded.

16. To begin with the beginning, the fact admits of no doubt that Vaishali is a child witness aged eight. She has not been offered oath as the learned Additional Sessions Judge says that she is unable to understand the sanctity of oath. There is nothing in the endorsement of the learned Additional Sessions Judge as to whether the witness is able to understand the duty of telling the truth. We are not unmindful of the fact and Shri Godhamgaonkar also fairly concedes that Bhagirathabai's death must have been caused in the room and in that case Vaishali must be in that room but the question of all the questions is whether Vaishali had saw the incident and particularly identified the assailant. We are told and it is the prosecution case that the incident took place between 2 and 3 a.m. It is not the prosecution case that there was light in the room. It is legitimate to assume that the assailant, whosoever he might be, would take all precautions to hide his identity and to take all precautions to achieve his target. In that case he would see that there was darkness in the room. Bhagirathabai must have raised alarm and cries only after first blow on her head was given because Vaishali does not say that she heard some loud talk going on between accused No. 2 and Bhagirathbai and then she woke up. The blow on the head must be so severe one that it is unacceptable that Bhagirathabai must be in a position to raise any cry.

If she had raised cries, as stated by Vaishali then neighbours would have also come there as door was open and there was open Osari in the front. We are told that two other persons were sleeping in that Osari and they were adult persons and they would have easily got up on hearing cries of Bhagirathabai and come to the rescue of Bhagirathabai. Why, we fail to understand, no person came to the rescue of Bhagirathabai even though Vaishali tells us and wants us to believe her that Bhagirathabai raised cries and she woke up on hearing the cries.

17. The evidence of Vaishali, if further tested in the crucible of probabilities, inspires little confidence. We are told by Vaishali that accused No. 2 Babu lifted Bhagirathabai on his back and, telling her that he would carry Bhagirathabai, he took her out and so she went again to sleep and she got up only in the morning as she was awakened by one Nagnath. In our judgment this version of Vaishali has been rightly pointed out as improbable by Shri Godhamgaonkar. We have tried to persuade ourselves but it is not possible for us to convince us that the little child receiving so much shock by such assault on her grand-mother would easily go to sleep after that assault without going out to tell her neighbour or without ascertaining as to whether any neighbour had accompanied accused No. 2 Babu to the hospital. She did not wait for some time to see as to who accompanied Babu and whether Nilkanth had accompanied him and whether other persons in the chawl or ladies in the wada had accompanied her further. It baffles our intelligence to accept that the girl went on to sleep immediately till she was awakened in the morning by Nagnath-only to be told that Bhagirathabai had fallen into the well. It was more reasonable on the part of the Vaishali to get up early in the morning and to make enquiry with her neighbours about the health of her grand mother/and about the whereabouts of the accused. The learned Additional Sessions Judge. It obviously appears, has overlooked all these aspects and his mere and bare observations that to his mind Vaishali is not a tutored witness cannot be accepted because he has not noted anywhere that he has marked the demeanour of the witness on which he says that she is not a tutored witness. On the contrary, Vaishali from the date of the incident resides with her maternal aunt. The accused are facing the trial for having committed murder of Meena, sister of the lady with whom she is now residing, and we cannot overlook that aspect. Learned Additional Sessions Judge has also overlooked that the cot is on one end while the other utensils are on the other end and when the blood-stains were found on those utensils, why blood stains were not found on the clothes of Vaishali and why blood-stained clothes Vaishali were not seized by the Police Officer when her statement was recorded. Thus, on close and considered examination of Vaishali's evidence, we take the view different from that of the learned Additional Sessions Judge, that evidence of Vaishali is not reliable and at any rate it stands in the need of corroboration.

18. Now the next point is as to whether that independent corroboration is available in other circumstantial evidence, connecting the accused. The pant and shirt of accused No. 2 Babu who is said to have assaulted the deceased and carried her from the room are attached under panchnama (Ex. 22). The report of

the Chemical Analyser (Ex. 36) shows that no human blood-stains were found on these clothes. So, in the face of the report of the Chemical Analyser, it cannot be said that there is any link connecting the accused No. 2 either with the assault or with the lifting of Bhagirathabai. If Vaishali's evidence is kept side for a moment there is no evidence as such to show that accused No. 2 assaulted or carried away Bhagirathabai from that room. Shri Dhuldhwaj, learned Additional Public Prosecutor, has tried to impress upon us that these accused used to make demands from the deceased and that might be the reason for them to commit murder. We have given our anxious thought over this argument but to our mind this argument is not tenable even for a moment. The witnesses examined by the prosecution have stated that the Bhagirathabai, the deceased, used to meet their demands and if that is so, what was the reason for the accused to go to the extent of committing the murder of this middle aged lady. It is just like telling us that a person has killed the hen which used to give golden eggs.

19. Coming to the case of accused No. 1 we have tried hard to find whether there is any evidence against him and the only evidence that connects him is that he has given report at the police station about suicide when suicide was not there. Accused No. 1 is the husband of the deceased. He might have acted on the information given by some of the villagers. The probability that he was ignorant of the real assailant cannot be ruled out because acting on his report accidental death was registered and A.S.I. Joshi was put in charge of enquiry and when the provisional post mortem report was received the offence of murder was registered. Even assuming that accused No. 1 Nilkanth lodged a false report, it is too much to assume that he had common intention with accused No. 2, that he was a party to cause evidence of murder to disappear. We fail to understand how the learned Additional Sessions Judge convicted him of the offence u/s 201 of the Penal Code and sentenced him for seven years" rigorous imprisonment when accused No. 1 is not convicted of that offence and when we are told that accused No. 2 carried the dead body out of the house.

19. Thus, on taking the overall picture of the matter and on considering the entire evidence and the probabilities springing from it, we are of the opinion that the prosecution has failed to prove the case against any of the accused and both the accused deserve to be acquitted. It is unfortunate that the murder, even though it has taken in the room, should go unpunished and the culprits should have been brought to book but the result is inevitable, though unfortunate. Hence the order.

20. The appeals are allowed. The order of Additional Sessions Judge is set aside and accused No. 2 Babu is acquitted of the offence punishable u/s 302 of the Penal Code and accused No. 1 Nilkanth is acquitted of the offence punishable u/s 201 of the Penal Code.

21. We must express our thanks to Shri P.G. Godhamgaonkar for assisting us in these two appeals.