
(2013) 03 BOM CK 0177
In the Bombay High Court
Case No : Criminal Appeal No. 1193 of 2007

Bandu Shankar Kadgaonkar	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 08-03-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 106
Penal Code, 1860 (IPC) — Section 302

Citation : (2013) ALLMR(Cri) 2701

Hon'ble Judges : V.K. Tahilramani, J;Sadhana S. Jadhav, J

Bench : Division Bench

Advocate : Arfan Sait, for the Appellant; Shilpa Gajare-Dhumal, APP, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Tahilramani, J.—This appeal is directed by the appellant-original accused against the Judgment and Order dated 22.08.2007 passed by the learned Additional Sessions Judge, Gadhinglaj in Sessions Case No. 1 of 2007. By the said Judgment and Order, the learned Sessions Judge convicted the appellant u/s 302 of Indian Penal Code and sentenced him to suffer Imprisonment for life and to pay fine of Rs. 5000/- i.d. R.I. for six months. The prosecution case briefly stated, is as under:

(i) The appellant was residing alongwith his son at village Madilage, Taluka-Ajara. District Kolhapur. Antu (deceased) alongwith his wife Muktabai, his sons Tanaji and Sanjay and daughter-in-law Jayashri was also residing in the very same village. The appellant was the friend of the deceased. Everyday in the morning both of them used to go to Chaloba forest to graze their cattle and they used to return at 5 p.m., On the day of incident also the appellant came to the house of Antu and both of them left to go to the forest to graze cattle at 10 a.m. However, on the day of incident i.e. on 6/9/2006 Antu nor appellant returned back. At

about 5 p.m. cattle of Antu returned home but Antu did not return home. P.W. 2 Muktabai, wife of deceased made enquiry at the house of the appellant and she came to know that the appellant had also not returned home.

(ii) It is the prosecution case that the appellant went to the police station and informed that he had committed murder of Antu. P.W. 1 Tanaji son of deceased was called. The appellant led Tanaji, P.W. 7 Vasant who was the friend of Tanaji and other persons to the spot in the forest where the dead body of Antu was found. The pant of the appellant was found bloodstained. The said pant came to be seized vide panchanama Exh. 25. P.W. 4 Parsu is panch witness to this panchanama. The dead body of Antu was sent for post mortem. P.W. 9 Dr. Kamble performed post mortem on the dead body of Antu. Dr. Kamble found the following injuries on the body of Antu.

1) Occipital bone fracture admitting one finger. On internal examination the brain was found lacerated on occipital region and fracture of basal skull.

According to the Dr. Kamble, all these injuries were antemortem. On internal examination of Thorax blood was found collected to larynx trachea bronchioles bilaterally. Both the lungs were congested. Pericardium was also congested. Blood was found in oesophagus. In the opinion of Dr. Kamble, cause of death is cardio respiratory arrest due to neurogenic shock due to laceration of brain at occipital area due to fracture of occipital and basal skull area. According to Dr. Kamble, injury found on the dead body are possible with the stone as well as stick.

(iii) Thus it is the prosecution case that the appellant assaulted Antu in Chaloba forest with a stone and stick and caused his death. After completion of investigation charge-sheet came to be filed. In due course the case was committed to the Court of Sessions.

2. Charge came to be framed against the accused/appellant u/s 302 of Indian Penal Code for causing death of Antu. The appellant/accused pleaded not guilty to the said charge and claimed to be tried. His defence is that of total denial and false implication. After going through the evidence adduced in this case, the learned Additional Sessions Judge convicted and sentenced the appellant as stated in Para 1 above, hence, this Appeal.

3. We have heard the learned Advocate appointed for the appellant and the learned APP for the State. After giving our anxious consideration to the facts and circumstances of the case, arguments advanced by the learned Advocates for the parties, the judgment delivered by the learned Additional Sessions Judge and the evidence on record, for the reasons stated below, we are of the opinion that the appellant assaulted Antu in Chaloba forest and caused his death.

4. There is no eye witness in the present case and the case is based entirely on circumstantial evidence. The circumstances are as under:

(a) The deceased and the appellant were last seen together while going to

Chaloba forest to graze their cattle.

(b) Thereafter neither the deceased nor the appellant returned home.

(c) Soon-after the incident the pant of the appellant was found to have blood stains.

(d) As per the CA report the pant of the appellant was having blood stains of the blood group of the deceased.

(e) The appellant showed the place where the dead body of Antu was found in the forest.

5. The first circumstance is that of last seen. P.W. 2 Muktabai who is the wife of deceased Antu has stated that she knew the appellant since last 5 to 6 years. Her husband and the appellant used to take their cattle for grazing to Chaloba jungle. They used to return at 5 p.m., On the day of the incident at about 10 a.m. her husband Antu as well as the appellant had taken their cattle towards Chaloba jungle. At about 5 p.m. cattle returned home but her husband did not return. She made enquiry at the house of the appellant and came to know that the appellant had also not returned home from Chaloba jungle.

6. The evidence of P.W. 6 Jayashri-daughter in law of the deceased shows that on the day of the incident at about 10 a.m. the appellant and deceased were last seen together. Jayashri has stated that on the day of incident at about 10 a.m. the appellant came to her house to call her father-in-law. The cattle of the appellant was with him. Thereafter, the appellant and her father-in-law went towards Chaloba Jungle with their respective cattle.

7. Since last 5-6 years the daily routine of the appellant as well as the deceased was to take that cattle together to Chaloba jungle at about 10 a.m. and they used to return back at about 5 p.m. This has been stated by P.W. 2 Muktabai, who is the wife of the deceased. P.W. 2 Muktabai has stated that however, on the day of the incident though the appellant alongwith deceased Antu had left with their respective cattle and gone towards Chaloba jungle, at 5 p.m. the cattle returned home but her husband did not return. When she made enquiry at the house of the appellant she came to know that the appellant also had not returned home.

8. Besides the circumstance of last seen together, the Prosecution has relied on the circumstance that immediately after the incident the pant of the appellant was found to have bloodstains. P.W. 4 panch witness Parsu has deposed on this aspect. He has stated that at the time of the arrest of the appellant, the pant of the appellant article 13 was found to have bloodstains. The evidence on record shows that this pant was sent to C.A. and as per the C.A. report Exh. 46/C the pant was found to have bloodstains of AB group. The clothes of the deceased which were sent to CA were also found to have bloodstains of AB group. This shows that the blood group of the deceased was found on the pant of the appellant. This is a very strong incriminating circumstance against the appellant.

9. The evidence of P.W. 1 Tanaji and P.W. 7 Vasant shows that immediately after the incident the appellant led the witnesses i.e. P.W. 1 Tanaji and P.W. 7 Vasant to the spot in the forest where the dead body of Antu was found. The forest is rather large one and had it not been for the fact that the appellant pointed out the place where the dead body of Antu was in the forest, the body of Antu would not easily have been located. This conduct on the part of the appellant also speaks volumes about his complicity in the offence.

10. The evidence on record shows that the deceased was last seen in the company of the appellant. In this connection, we may refer to Section 106 of the Evidence Act. Section 106 of the Evidence Act provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. In several recent decisions, the Supreme Court has held that the principles which underlines Section 106 of the Evidence Act can be applied in the context of the last seen theory when certain facts are especially within the knowledge of a person. In the State of Rajasthan Vs. Kashi Ram, , the Supreme Court has observed that if the accused fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation as an additional link which completes the chain.

11. The learned Counsel for the appellant stated that as far as the circumstance of the appellant pointing out dead body is concerned, the panchanama ought to have been drawn of the appellant pointing out the place in the forest where dead body of Antu was found. In this connection he has placed reliance on the decision of this Court in the case of Shivaji Vasang Bagale Vs. The State of Maharashtra, . In the said case it is seen that the accused was arrested and thereafter he made a statement before the police that he would point out the place where he had thrown the dead body. Thereafter he led the police to the spot where the dead body was. Therefore the distinguishing factor in the decision relied upon is in that case the accused was already under arrest. In the present case the appellant was not arrested when he showed P.W. 1 Tanaji and P.W. 7 Vasant the place where the body was in the forest. In view of the fact that accused in the case relied upon had been arrested on suspicion of being last seen around place of offence, this observation had been made in the said case. Thus this decision would not apply to the facts of the present case.

12. The learned Advocate for the appellant then pointed out that as far as blood stained clothes are concerned, the appellant in his statement u/s 313 of Cr.P.C.

has stated that he accompanied son of deceased to the jungle to ascertain whether Antu is alive. He went to jungle. When he went towards dead body to ascertain whether Antu is alive at that time his clothes were stained with blood. This version given by the appellant in his statement u/s 313 Cr.P.C. is falsified by the evidence given by P.W. 1 Tanaji, son of Antu as well as P.W. 7 Vasant and other witnesses. Thus giving of false explanation by the appellant is another link in the chain of circumstances against the appellant. The circumstances proved by the prosecution in the present case taken cumulatively form a chain so complete that there is no escape from the conclusion that within all reasonable probabilities the crime was committed by the appellant and none else.

13. Looking to the evidence on record we find that there is sufficient evidence to connect the appellant with the crime. Hence, we find no merit in the appeal. Appeal is dismissed.

14. Office to communicate this order to the Superintendent of prison where the appellant is lodged and to the appellant-original accused. Writ of order is expedited. At this stage, we must record our appreciation for Mr. Arfan Sait, Advocate appointed from High Court Legal Services Committee, Bombay to represent the appellant. We found that he had meticulously prepared the matter and he has very ably argued the matter. We quantify legal fees to be paid to him by the High Court Legal Services Committee at Rs. 2200/-. The said fees be paid to Advocate Mr. Arfan Sait within three months from today.