

(2017) 07 BOM CK 0266
In the Bombay High Court
Case No : 128 of 2001

Bhagwat s/o. Narayan Mundhe

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 20-07-2017

Acts Referred:

[Indian Penal Code, 1860](#), [Section 302](#),
[Section 404](#), [Section 394](#) -
Punishment for murder - Dishonest misappropriation of property possessed by
deceased person at the time of

Citation : (2017) 07 BOM CK 0266

Hon'ble Judges : T.V. Nalawade, Sunil K. Kotwal

Bench : DIVISION BENCH

Advocate : U.B. Bondar, S.D. Ghayal

Final Decision : Allowed

Judgement

1. The appeal is filed against judgment and order of Sessions Case No. 29/1999 which was pending before the learned Additional Sessions Judge, Ambejogai, District Beed. The Trial Court has convicted the appellant for offence punishable under section 302 of Indian Penal Code (hereinafter referred to as "IPC" for short) and he is sentenced to suffer imprisonment for life. Fine amount of Rs.1,000/- is also imposed on him. Both the sides are heard.

2. The facts leading to the institution of the appeal can be stated as follows :- Deceased Kiran was the wife of Balaji Munde. Balaji is real brother of first informant Mahadev. They are residents of Dadahari Vadgaon, Tahsil Parli. Age of Mahadev was around 22 years at the relevant time. The incident took place on 5.1.1999. Balaji was in service and for service, he was out of station. The father of first informant namely Sopan was out of station as he had gone to Parbhani to see relatives. On that day, the first informant Mahadev had gone to field with his bullocks.

3. At about 12.00 noon the deceased came to the field with lunch box for first

informant. After noticing the deceased, Mahadev went towards hut to have lunch. He noticed that the lunch box was kept in the hut, but deceased was not present in the vicinity. He gave calls to deceased, but there was no response and so, he started searching for deceased. He went towards the lands of village Loni and when he was proceeding towards canal which divides Loni Shivar and Dadahari Vadgaon Shivar, the accused emerged from Tur crop situated beyond the canal. After seeing the first informant, the accused became frightened and he started running away. The first informant gave call to the accused, but he did not give response. The first informant then crossed the canal and he went towards the field where there was standing crop of Tur. There he noticed that Kiran was lying and on her face, there was big stone. He noticed that she was dead. He returned to the village and informed the incident to his father and uncle. Father had returned to the village in the meantime. They went to police station and Mahadev gave report. The crime at C.R. No. 7/1999 came to be registered in Parli Rural Police Station for the offences punishable under section 302, 404 of IPC at about 16.15 hours. In the report, Mahadev informed that accused had taken away gold ornament like Mangalsutra, ear rings and Nathani (ring, ornament of nose) of deceased.

4. During the course of investigation, the enquest panchanama was prepared by police in presence of the panch witnesses. No injuries were found on the dead body. The dead body was referred for P.M. examination. Doctor noticed that there was scratch over right middle finger on dorsal side of length of 1.5 c.m. and he noticed one contused abrasion over right cheek having size 1 c.m. x 1 c.m. These injuries were caused within 48 hours and they were antemortam in nature. The P.M. was conducted on 6.1.1999 between 1.00 p.m. and 2.10 p.m. Doctor gave opinion that the death took place due to cardio respiratory arrest due to asphyxia which was caused by smothering (gagging).

5. During the course of investigation, police prepared spot panchanama on 5.1.1999 and the stone which was found on the dead body was taken over. A map showing the location of the spot was shown in the spot panchanama. Statements of witnesses, who include one Rode and the members of family of Mahadev came to be recorded. Rode gave statement on 6.1.1999. Statements of some other witnesses of village Dadahari Vadgaon came to be recorded on 8.1.1999 as they had seen the accused on 5.1.1999 and they had noticed that he was running. The accused was not available for some time. Ultimately on 2.2.1999 he surrendered before police and he came to be arrested. After completion of investigation, chargesheet came to be filed for offences punishable under sections 302 and 394 of IPC. Prosecution examined in all 13 witnesses. The Trial Court has acquitted the appellant of the offence punishable under section 394 of IPC. The Trial Court has believed Mahadev and also the other witnesses, who had seen the accused in the vicinity at the relevant time.

6. The learned counsel for the appellant submitted that the case is entirely based on circumstantial evidence, but the circumstances which are used against the

accused are not established and they are not that convincing. The learned counsel submitted that the story of the prosecution itself appears to be improbable and there is possibility that real culprit is not arrested and the accused is falsely implicated to save the real culprit. The circumstances on which the arguments are advanced are being discussed hereinafter.

7. Mahadev (PW 2) is the main witness of the prosecution. He has deposed that on that day, he had gone to the field which is situated within the limits of village Loni for grazing cattle. He has given evidence that on that day, the other male members like his brother and father were not at home and they were out of station. He has given evidence that he had taken cattle to the field for grazing and when he noticed that the deceased had come with lunch box and it was noon time, he started proceeding towards hut where he was supposed to take lunch. He has given evidence that when he reached the hut, he found the lunch box, but the deceased was not present in the vicinity. He has deposed that he gave calls and started searching for the deceased and during search he went towards brooklet. He has deposed that when he was near the canal/brooklet, he saw that accused was running away in frightened condition from the canal, brooklet. He has deposed that he gave calls to the accused to ask him as to why he was running, but the accused did not reply and he ran away. He has deposed that he then crossed the brooklet and then he noticed the dead body of deceased lying in gram crop. He has deposed that he noticed that the gold ornaments like ear rings, nose ring and Mangalsutra which the deceased was ordinarily wearing were missing.

8. Mahadev (PW 2) has given evidence that after seeing the dead body, he went towards Rode (PW 7), who was also grazing cattle and he informed the incident and he disclosed that the dead body of Kiran was lying at that place. He has deposed that when Rode advised him to inform the uncle, he returned home. He has deposed that his father had returned from Parbhani already and he narrated the incident to his father and then they went to Parli Police Station where he gave the report. The report is proved in his evidence as Exh. 15.

9. The evidence given in the cross examination by Mahadev shows that he is avoiding to admit many things. From his evidence, following circumstances can be marked which can say much about the conduct of this witness and which can help to ascertain as to whether the witness is truthful.

(i) When it was put to this witness that accused is cousin brother of one Kiran, who was the first wife of Balaji, brother of this witness, this witness showed ignorance about it. He, however, admits that accused is from his Bhavki. Balaji admitted this fact.

(ii) When he was asked about his status, he answered that he was still unmarried and he avoided to admit that application for maintenance was filed against him in the Court by his wife. His father admitted this fact.

(iii) There is no corroboration to his substantive evidence in F.I.R. that after

noticing the dead body, he had contacted Rode in the field where he was grazing cattle.

(iv) When he has given evidence that he noticed that the gold ornaments like ear rings, nose ring and Mangalsutra which the deceased used to have on her person were missing, the document like enquest panchanama shows that ear rings were there. Mangalsutra of black beads was also there.

(v) The ornaments which were allegedly missing like nose ring and Mangalsutra are not recovered and there was no injury on the dead body showing that by using force the ornaments like nose ring was removed for taking it by anybody. The weight of gold used for these two ornaments together is given as 2.5 grams.

(vi) The evidence of other witnesses is not consistent with the evidence of this witness on time and also on other aspects. The evidence shows that for about three hours, he was not in the company of Rode when the spot of offence is situated within walking distance of hardly 5 to 10 minutes from the field where he was grazing the cattle. This field belongs to Rode and is situated in Dadahari Vadgaon and not of Mahadev and not situated in Loni.

(vii) When it was possible for Rode to see the accused proceeding towards the site of offence and also witness the deceased proceeding towards the same side, he could not notice them. Nobody say that they had seen accused proceeding towards that side. Even Rode does not say that he had seen accused coming from that side when according to first informant accused started running towards village Dadahari Vadgaon.

10. Mahadev (PW 2) and his brother Balaji (PW 4) could not give particulars of purchase of the ornaments which were allegedly stolen. Balaji has tried to say that he had purchased the ornaments from the shop of one Atram Tak, but according to him, they were not purchased at one time and they were purchased as per his convenience. When there is clear probability that ornaments from the person of Kiran were not snatched and not taken away by the person, who committed murder, the case of motive against the accused becomes very weak. In the cross examination, Balaji has admitted that the father of the accused owns 10 Acres of agricultural land. Both Balaji and Mahadev have avoided to admit that there are 100 lemon trees in the field of accused and there is well in the field. One witness has admitted that it is irrigated land. It appears that Mahadev was working with Rode for cultivating his land and this circumstance creates a probability that financial condition of accused was better than that of Mahadev. This creates probability that false allegations are made that accused had committed theft and probably for committing theft, he has murdered Kiran. Accused was aged about 18 years and it does not look probable that for committing theft of 2.5 grams gold worth hardly Rs.1000/- at that time, he murdered wife of his relative.

11. Bhimrao Rode (PW 7) has given evidence that he had gone to the field situated in village Dadahari Vadgaon at about 11.00 a.m. and he had seen that

Mahadev was grazing bullocks in his field. He has further deposed that Mahadev left his company at about 12.00 noon by saying that he wanted to take the lunch. His evidence shows that he had taken gram crop in the field and he had also started harvesting the crop. He has deposed that Mahadev returned back to the field immediately and informed that he had noticed dead body of Kiran and probably she was murdered by son of Narayan, the accused. In the cross examination, he has admitted that in the police statement he had stated that Mahadev had left his company at about 12.30 p.m. and he had returned at 3.30 p.m. The police statement of this witness was recorded on 6.1.1999 and not on the date of incident and his name was not mentioned in the F.I.R. by Mahadev. In any case, he does not say that he had seen Kiran on that day or he had seen accused. Due to these circumstances, there are possibilities that he is a got up witness or he was present in the field and Mahadev had left his company at about 12.30 p.m. and he had returned at about 3.30 p.m. when Mahadev could have returned within ten minutes to him if he had noticed the dead body. Both the probabilities are against the case of the prosecution. These circumstances create probability that incident was not disclosed by Mahadev immediately to anybody and delay was caused in giving F.I.R. The probability that Mahadev was not in the company of Bhimrao Rode for about three hours can create another probability that there was opportunity for commission of offence to Mahadev. The absence of injuries on the dead body is a circumstance in support of this probability. The circumstance of non recovery of ornaments is also supporting such probability. When her ear rings were there, Mahadev falsely contended that ear rings were also stolen. Due to these circumstances Mahadev cannot be believed.

12. Some witnesses like Subhash (PW 9) and Allabaksh (PW 10) are examined to show that on the evening of 5th, the day of incident, the accused had come to the field of Subhash and he had stayed there in the night time after taking dinner in his field. Their evidence does not show that they found any suspicion in the behaviour or conduct of the accused. Their statements were recorded on 8th and due to these circumstances, it also can said that they did not feel that there was anything suspicious about the accused. The accused remained present in the company of villagers after the incident and this circumstance is not consistent with the guilt.

13. The two witnesses like Kondiba (PW 5) and Vijaynath (PW 6) are examined to show that at about 6.00 p.m. they had noticed that accused had come from northern side and accused was running. Vijaynath has tried to say that when they saw police jeep, accused tried to hide himself. Both have tried to say that they had seen accused at about 4.00 p.m. Considering the distance between their field and the spot of incident, it does not look probable that accused had taken 30 minutes to reach that spot. The distance between the lands of first informant and these witnesses is given as one and half k.m. and the land of father of the accused is adjacent to the lands of these witnesses. If accused was proceeding towards his field, it was not incriminating circumstance. Their statements were

recorded on 8th, after about 3 days of the incident. Due to these circumstances also, it can be said that they had not noticed anything abnormal on that day. Everybody of that locality had learnt about the murder of Kiran on that day and if there was anything abnormal in the conduct of accused, the witnesses would have approached police immediately. Thus, not much weight can be given to the evidence given by these two witnesses of aforesaid nature.

14. The spot panchanama at Exh. 13 is admitted by the accused. Police have given handsketch map of scene of offence. The map shows that on southern side of the field where the dead body was found, there is brooklet and on the south of that brooklet, there is Dadahari Vadgaon Shivar. On north of the brooklet, there is Loni Shivar. The dead body was lying in the standing crop of Tur and it was at the distance of 9 ft. from the crop of gram. Evidence is given by Mahadev that he had seen the accused running away from the brooklet. The evidence of all the witnesses shows that the village Dadahari Vadgaon is situated on the southern side of the brooklet and the field of accused is also situated on southern side and at much distance, more than one and half k.m. from the brooklet and village Loni is situated on northern side of the field where the dead body was found. Thus, Kiran must have come from village Dadahari Vadgaon, from southern side to the field where Mahadev was working. There was no need for her to cross the brooklet and to go to the field of Laxman Sonawane where the dead body was lying. There was also no need for her to enter in the standing Tur crop. The circumstances do not show that any force was used and Kiran was dragged up to that spot. Similarly, accused had no reason to come towards that side or cross the brooklet. In view of these circumstances, the evidence of Mahadev (PW 2) needs to be subjected to close scrutiny and it was necessary for him to say something as to why the deceased had crossed the brooklet and had gone towards the field of Laxman. It was expected from Mahadev to say as to what he was doing for about three hours, the period for which he was not in the company of Rode. Only because Mahadev gave F.I.R. and he is saying that he saw the accused running away the case is filed against the accused. For many reasons a person can run and even when the person has seen the dead body.

15. Though the record shows that for few days after the incident, the accused was not arrested and it is the case of prosecution that he was absconding, there is also circumstance that on the same night accused was in the company of the witnesses examined by the prosecution and they did not notice any suspicious thing. Had the crime not registered against the accused, in ordinary course, police could have registered the crime even against Mahadev (PW 2). His conduct of not admitting the relationship with the accused of the first wife of his brother, not admitting that he was married show that there is something suspicious in respect of Mahadev. The deceased was carrying of four months and that can be seen from the P.M. report. Portion of the Sari of the deceased was found to be gagged in to the mouth of the deceased and there was smothering. Then on the face of the deceased a stone was kept. These circumstances create a probability, there was no resistance and somebody known to the deceased had done the act.

In addition to these circumstances, there are circumstances as mentioned above which are not explained by the prosecution. Only because Mahadev was saying that he had seen the accused running away from the brooklet, the crime was registered against him. No allegedly stolen articles are recovered from him and there is no other incriminating circumstance against the accused. The circumstance mentioned in the evidence of Mahadev even if it is accepted can at the most create suspicion against the accused. On the basis of such suspension, conviction cannot be given for offence of murder.

16. In the case reported as AIR 1992 SUPREME COURT 2045 (State of U.P. Vs. Dr. R.P. Mittal), the Apex Court has given essential ingredients to prove the guilt by circumstantial evidence and they are as under :-

"(1) Circumstances from which conclusion is drawn should be fully proved.

(2) Circumstances should be conclusive.

(3) All facts so established should be consistent only with the hypothesis of guilt and inconsistent with innocence of the accused.

(4) Circumstances should exclude the possibility of guilt of a person other than the accused."

It is true that the circumstances quoted are evidence in view of section 3 of Evidence Act and are relevant under section 8 of Evidence Act and circumstantial evidence can be used for conviction, but chain of evidence must be so complete, that it does not leave any reasonable ground for the conclusion consistent with the innocence of the accused. The circumstances must show that in all human probability, the act must have been done by the accused. The relevant circumstances of the present matter are already quoted and they have created other probabilities. This Court holds that the Trial Court has committed grave error in convicting the accused for the offence of murder.

17. In the result, the appeal is allowed. The judgment and order of the Trial Court is hereby set aside. The accused is acquitted of the offence of murder for which he was charged and tried. His bail bonds stand cancelled. The fine amount, if any, deposited by the appellant is to be returned to him.