

(2008) 01 BOM CK 0028
In the Bombay High Court
Case No : Criminal Appeal No. 316 of 1989

Chapaya @ Mahakulya

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 29-01-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 294, 313
Penal Code, 1860 (IPC) — Section 302

Citation : (2008) 01 BOM CK 0028

Hon'ble Judges : P.R. Borkar, J;Naresh H. Patil, J

Bench : Division Bench

Advocate : V.D. Sapkal, for the Appellant; S.D. Kaldade, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

P.R. Borkar, J.—This appeal is preferred by the accused who is convicted of offence punishable u/s 302 of Indian Penal Code (IPC) and sentenced to suffer imprisonment for life by the learned Sessions Judge, Parbhani in Sessions Case No. 164 of 1988 decided on 16.03.1989.

2. It is prosecution case that on 13.05.1988 deceased Bamshettya Aprangya Shinde has come to meet his sister complainant -Yeojabai Sheshrao Kale (P.W. 2) at her tent/hut at village Jiwaji-Jawala, Tq. Selu, Dist. Parbhani. It was about 7.00 a.m. At that time the appellant was residing just adjacent in another tent/hut of complainant - Yeojabai (P.W. 2). On seeing Bamshettya at about 9.00 a.m. the appellant gave blow with axe and said that his wife was kidnapped by brother of Bamshettya. One blow was given on the head of Bamshettya. He fell down. Second blow was given on his buttock. As a result, Bamshettya became unconscious and the appellant ran away. Yeojabai (P.W. 2) and others immediately took Bamshettya to first Rural Hospital at Selu. The complaint of Yeojabai (P.W. 2) was recorded by Police as Bamshettya was unconscious. It was registered at 11=05 hours. Thereafter, Bamshettya was shifted to Civil Hospital,

Parbhani. There he died on 18.05.1988.

3. In this case Shri V.D. Sapkal is appointed as amicus curiae to defend the appellant. The appellant was initially released on bail. He failed to appear. So, non-bailable warrant was issued against him, but same could not be executed. Notice to the surety was served, but whereabouts of the appellant could not be traced out and his presence could not be secured. Again and again non-bailable warrants were issued. All efforts made by the Court to secure presence of the appellant have failed. Finally, this Court [Coram : P.V. Hardas & S.P. Kukday, JJ] passed order dated 18th September, 2007 after considering the ratio in Bani Singh and others Vs. State of U.P., and Rishi Nandan Pandit and Others Vs. State of Bihar, and appointed Shri V.D. Sapkal as an amicus curiae to represent the appellant in this appeal and directed the Registry to supply him one copy of the paper book and to list the matter for hearing and accordingly the matter has come up for hearing.

4. Shri Sapkal brought to our notice a case of Nandkumar Munnaswami Pilley v. State of Maharashtra 2008 All MR (Cri) 136. The Division Bench of this Court has considered case of Bani Singh (Supra) and stated about various options available to the Court. Question was raised if an accused person after having secured bail from High Court, continuously remains absent, does not respond to court notices, does not respond to bailable or non-bailable warrants and does not respond to proclamations under Cr.P.C., has a right to contend that his appeal should not be dismissed in default but, it should be heard and decided on merits. After framing said point in para 4 and considering case of Bani Singh (Supra), in para 10 it is stated that one course open is to appoint an Advocate from the Legal Aid Panel and proceed further for hearing. But, in one matter before the Court the advocate was elevated as Judge of the High Court and in another matter the advocate had expired. The Court considered in para 11 that in case the appeal is dismissed without securing presence of the accused, it would not be possible to execute sentence. In para 12 it is stated that even in case the appeal is allowed and appellant is acquitted that would benefit him and it would be almost condoning illegal acts of jumping the bail & committing breach of the bond executed at the time of bail. The Court in the circumstances felt that proper course is to dismiss the appeal.

5. In the case of Bani Singh (Supra), both appellant and his lawyer were absent on appointed day of hearing. It was observed that the Court was not bound to adjourn the case but should dispose of appeal on merit. Dismissal of appeal simpliciter for non-prosecution is not contemplated under the Cr.P.C. The law laid down by the Supreme Court is as follows in para Nos. 14 & 15 of the case:

14. ...The law clearly expects the Appellate Court to dispose of the appeal on merits, but merely by perusing the reasoning of the trial Court in the judgment, by cross-checking the reasoning with the evidence on record with a view to satisfying itself that the reasoning and findings recorded by the trial Court are consistent with the material on record. The law, therefore, does not envisage the

dismissal of the appeal for default or non-prosecution but only contemplates disposal on merits after perusal of the record. Therefore, with respect, we find it difficult to agree with the suggestion in Ram Naresh Yadav's case AIR 1987 SC 1500 that if the appellant or his pleader is not present, the proper course would be to dismiss an appeal for non-prosecution.

15. ...The law does not enjoin that the Court shall adjourn the case if both the appellant and his lawyer are absent. If the Court does so as a matter of prudence or indulgence, it is a different matter, but it is not bound to adjourn the matter. It can dispose of the appeal after perusing the record and the judgment of the trial Court. We would, however, hasten to add that if the accused is in jail and cannot, on his own, come to Court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the accused-appellant if his lawyer is not present. If the lawyer is absent, and the Court deems it appropriate to appoint a lawyer to State expense to assist it, there is nothing in the law to preclude it from doing so....

6. In "Rishi Nandan Pandit" (Supra) it is held that where appeal is against conviction and the counsel engaged by the accused does not appear, it is not expected that the appeal should be dismissed for default. The appeal should be decided by appointing another counsel as *amicus curiae*. Their Lordships disapproved the action of the High Court of proceeding with appeal without availing legal assistance. The High Court on mere scrutiny of evidence and relying upon statements made by prosecution witnesses before Investigating Officer, had confirmed conviction and sentence.

7. In view of the aforesaid position and law laid down by the Supreme Court, in our opinion, considering that the present appeal has been pending since March, 1989, it is desirable that we should hear Shri V.D. Sapkal, appointed as *amicus curiae* and dispose of this appeal on merit.

8. In this case the prosecution examined two eye witnesses Yeojabai (P.W. 2) and Bugdabai (P.W. 3) and it was stated that deceased Bamshettya had come to meet his sister Yeojabai (P.W. 2). On seeing him at about 9.00 a.m. the accused/appellant came near him and said that his younger brother had illicit relations with wife of the accused/appellant and the accused/appellant would kill him and thereafter the accused/appellant gave blow with axe on the head of deceased Bamshettya, who fell down and thereafter another blow with axe was given on the buttock of Bamshettya. Yeojabai (P.W. 2) and Bugdabai (P.W. 3) and others raised shouts. The accused ran away. The injured was taken to Selu, where Yeojabai (P.W. 2) lodged complaint as stated above.

9. It is argued before us that both the witnesses have stated that daughter of Yeojabai (P.W. 2) was in the left arm of deceased Bamshettya when quarrel took place, but there was no injury to said child. No question regarding the same was also asked. The fact remained that there was no injury to the child.

10. It is also argued before us that statement of Bugdabai (P.W. 3) was not

immediately recorded. However, her name is appearing as one of the eye witnesses in the complaint which was immediately recorded within two hours. Moreover, P.S.I. Barbade (P.W. 4) has stated that he had gone to record statement of witnesses, but witnesses were not traceable. Therefore, he recorded statement of Bugdabai on 21.05.1988. The witnesses are poor paradhis. They might have gone out for labour work when P.S.I. Barbade went to record their statement.

11. Dr. Gaikwad (P.W. 1) performed post-mortem examination and following external injuries were found:

(i) Sutured wound on left parietal and temporal region; the said injury was in the shape of hockey stick, if the said stick is placed inversely. It was located 1/2" above tragus of left ear-pinna, vertically upward, measuring 6" in length.

(ii) Contusion on left ankle joint medial aspect 1" in diameter; roundish in shape, blue coloured.

(iii) Sutured wound on right gluteal region. Oblique in direction 3" in length seems to be incised wound.

(iv) Sutured wound on left gluteal region 1" in length, oblique in continuation with injury No. 3.

There was fracture of skull bone at left parietal region.

On internal examination, the Doctor found following injuries:

(i) Sutured wound on the scalp with blood clotted and stain under the skin on left parietal and temporal region.

(ii) Fracture left parietal and temporal bone under sutured wound, measuring about 4" in length, vertically placed.

(iii) Brain is injured under the fracture side i.e. under which a big haematoma was seen. The blood was collected on posterior aspect of injury site.

The Doctor stated that external injury No. 1 which corresponds with internal injury to skull and brain was sufficient in the ordinary course of nature to cause death. An axe (article No. 1) attached in this case was shown to the Doctor. The Doctor stated that it was possible to cause such injuries by said axe. The post-mortem was performed. Injury Nos. 1, 3 & 4 were sutured and it was suggested that it is difficult to state whether the sutured wound was lacerated injury or incised one. The Doctor stated that it was not possible with a sickle but possible with a chopper.

12. In this case the accused was absconding for one and half months and he was arrested on 09.08.1988. So for almost three months the accused was absconding. Thereafter, the accused/appellant while in Police Custody showed his willingness to discover the axe and he produced the axe. Said memorandum and discovery panchanama Exh. 9 and Exh. 10 respectively are admitted by

appellant's advocate u/s 294 of Cr.P.C. Similarly, inquest panchanama Exh.6, panchanama of seizure of clothes of deceased Exh.7 and spot panchanama Exh.8 were also admitted u/s 294 of Cr.P.C. Chemical Analyser's report produced at Exh.20 shows that there were blood stains on the cloth of the deceased of "B" group, but there were no blood stains on the axe that was discovered. It may be noted that the axe was produced after the appellant was arrested three months after the incident. In the meantime it was concealed in a boundary bund of a land.

13. In this case there are evidence of eye witnesses, which is trustworthy. There is immediate complaint within two hours. There is medical evidence, spot panchanama, inquest panchanama and panchanama of seizure of clothes of deceased.

Absolutely, there is no reason to disbelieve the prosecution witnesses. In the cross-examination Yeojabai (P.W. 2), it was suggested that her step brother had kidnapped wife of the accused. Accused/appellant also admits that he had enmity with the family of deceased. So, in the circumstances, absolutely there is no reason to disbelieve the prosecution case. In the statement u/s 313 of Cr.P.C., the accused/appellant stated that he was in Bombay when incident took place, but he did not lead any evidence to prove the plea of alibi. In the totality of the circumstances, in our opinion, the appeal has no merit. There is sufficient evidence to prove guilt of the accused beyond reasonable doubt.

14. In these circumstances, the appeal is dismissed. The order of conviction and sentence is confirmed. Issue standing warrant against the appellant and whenever he is arrested, he should be sent for undergoing sentence. The concerned Police Inspector of concerned Police Station shall submit report regarding efforts made to trace out accused/appellant to the Registry of the High Court for placing before this Court after every three months, till presence of the appellant is secured or further order is passed.