
(2015) 03 BOM CK 0336
In the Bombay High Court
Case No : Criminal Appeal No. 888 of 2013

Dinanath Parmeshwar Sahani

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 04-03-2015

Acts Referred:

Evidence Act, 1872 — Section 106
Penal Code, 1860 (IPC) — Section 302

Citation : (2015) 03 BOM CK 0336

Hon'ble Judges : V.K. Tahilramani, J;I.K. Jain, J

Bench : Division Bench

Advocate : Abhijeet A. Joshi and Nigel Quraishu, for the Appellant; A.S. Pai, APP, Advocates for the Respondent

Final Decision : Dismissed

Judgement

V.K. Tahilramani, J—The appellant/original accused has preferred this Appeal against the Judgment and Order dated 18.10.2012 passed by the learned Additional Sessions Judge, Pune in Sessions Case No. 636 of 2011. By the said Judgment and Order, the learned Sessions Judge convicted the appellant under Section 302 of the Indian Penal Code and sentenced him to rigorous imprisonment for life and fine of Rs. 1,000/-, in default rigorous imprisonment for three months.

2. The prosecution case briefly stated is as under:--

"Deceased Manorama was the wife of PW-4 Maruti. The marriage of Maruti and Manorama had taken place about ten years prior to the incident. Manorama deserted Maruti. The appellant was residing in a room owned by PW-2 Nitin Barate. The said room was situated in Survey No. 27 at village Warjegaon, Taluka Haveli in Pune. There were about 30 rooms. Out of the said 30 rooms, four rooms were newly constructed. The appellant was staying in one of the newly constructed rooms. PW-3 Jagdish was also one of the tenants of Nitin. He ran grocery shop in the said room. The room of PW-3 Jagdish was situated 50

feet away from the room of the appellant. The appellant had inquired with PW-3 Jagdish about availability of room on rent. Just prior to that, PW-2 Nitin had informed PW-3 Jagdish that one room was vacant and was available for letting out. PW-3 Jagdish then asked the appellant to wait and he informed PW-2 Nitin. Thereafter, PW-2 Nitin gave the room to the appellant on rent. At the time of taking the room on rent, the appellant informed Nitin that he alone was going to stay in the room. From the very next day, the appellant came to the room to stay. PW-3 Jagdish used to daily see the appellant going out to attend his work. Thus, the appellant occupied the room given to him on rent by PW-2 Nitin from 1st week of May, 2011."

On 12.05.2011 PW-3 Jagdish noticed the appellant going to his room with one woman. Jagdish informed this fact to PW-2 Nitin. At that time Nitin was out of station. Nitin informed Jagdish that he will come later on. On the next day i.e. 13.05.2011 Nitin visited the room of the appellant. At that time he saw that the door was locked from outside. On 14.05.2011, in the morning, Sishankumar Prasad, neighbour of the appellant informed Nitin that the room given to the appellant was locked from outside but from inside the room some foul odour was emanating. Nitin then went to the room. He sensed foul odour coming from the room of the appellant. Then lock of the room was broken open. Inside the room, they noticed one lady in unconscious state. At that time, PW-3 tenant Jagdish informed Nitin that the same woman was seen by him with the appellant. Meanwhile, the appellant made a phone call on the cell phone of Sishankumar. Sishankumar informed this fact to Nitin. Then Nitin took the phone from Sishankumar and listened to the conversation of the appellant. Nitin heard the appellant saying that he is Dinanath and he had committed mistake by committing murder of that woman and he prayed that he may be excused. Nitin disclosed his identity to the appellant and inquired about his whereabouts. Then phone call was cut by the appellant. Thereafter, many times they tried to call the appellant but in vain. Then information was given to Warje Malwadi Police Station. The police took the lady to Sasoon Hospital where the Medical officer declared that the woman was dead and her death had taken place due to throttling. PW-1 PSI Gaikwad then lodged FIR on behalf of the State. The body was sent for post mortem. During post mortem, a tattoo was found on the arm of the deceased lady on which the name Maruti was written. The appellant was arrested. During investigation, it was revealed that the dead body was that of Manorama Karande and she was the wife of PW-4 Maruti Karande. After completion of investigation, charge sheet came to be filed.

3. Charge came to be framed against the appellant under Section 302 of the Indian Penal Code. The appellant pleaded not guilty to the said charge and claimed to be tried. After going through the evidence adduced in this case, the learned Sessions Judge convicted and sentenced the appellant as stated in para 1 above, hence, this Appeal.

4. We have heard the learned counsel for the appellant and the learned APP for

the respondent/State. We have carefully considered the facts and circumstances of this case, the submissions of learned counsel for both sides, the Judgment and Order passed by the learned Sessions Judge and the evidence in this case. After carefully considering the same, for the below mentioned reasons we are of the opinion that the appellant committed the murder of Manorama by throttling her.

5. There is no eye witness in the present case and the case is totally dependent on circumstantial evidence. In order to prove its case, the prosecution has mainly relied on the following circumstances.

"(i) The deceased Manorama was last seen with the appellant in the evening of 12.05.2011.

(ii) The appellant and the deceased Manorama were seen going to the room of the appellant in the evening of 12.05.2011. Thereafter, the room was found locked from outside and the dead body of Manorama was found in the room of the appellant on 14.05.2011.

(iii) Extra judicial confession by the appellant to PW-2 Nitin."

6. The first circumstance is deposed by PW-3 Jagdish. Jagdish has stated that PW-2 Nitin was his landlord. Jagdish was residing in the room of Nitin as tenant since last 2 to 3 years. In his room, he was running a grocery shop. In the first week of May, 2011, when he was present in the grocery shop, the appellant came and inquired about availability of room on rent. Just prior to that, PW-2 Nitin had informed Jagdish about one room being vacant and available for letting out. Jagdish then asked the appellant to wait and he made a phone call to PW-2 Nitin. PW-2 Nitin then came to the shop of Jagdish. In the meanwhile, Jagdish inquired the name and whereabouts of the appellant. The appellant gave his name as Dinanath Sahani, originally resident of Gorakhpur in Uttar Pradesh. Then, there was talk between the appellant and PW-2 Nitin regarding hiring the room. From the next day, Jagdish saw the appellant had occupied the room. Jagdish used to daily see the appellant going out of the room to attend his duty. Jagdish has stated that on 12.05.2011 he was present in front of his grocery shop in the evening. At that time, he noticed the appellant proceeding towards his room along with one woman. Then he made phone call to PW-2 Nitin and informed him about the said fact. Nitin informed that he is out and he will come later. On 14.05.2011, in the morning, Jagdish learnt that one woman had been murdered in the room of the appellant, hence, he went to the room. He noticed that the woman who was murdered was the same woman he had seen with the appellant in the evening of 12.05.2011.

7. The evidence of PW-2 Nitin also shows that the appellant was given the room on rent in which the dead body was found on 14.05.2011. Nitin has stated that he had about 30 rooms. Out of the said 30 rooms, four were newly constructed. PW-3 Jagdish was the tenant in one room from which Jagdish ran grocery shop. One Sishankumar was also a tenant. In the first week of May, in the evening, his tenant PW-3 Jagdish informed him on phone that one person had inquired about

availability of room on rent. Nitin instructed Jagdish to keep that person waiting till his arrival at the spot. Nitin reached the spot. His tenant Jagdish introduced him to the person. The said person was Dinanath Sahani/appellant. Then Nitin inquired about the whereabouts and previous residence of the said Dinanath Sahani and agreed to give the room on rent. That person informed Nitin that he alone was going to stay in the rented room. Nitin has further stated that on 12.05.2011, in the evening, his tenant PW-3 Jagdish telephoned him and informed that the appellant had taken one woman to his rented room. On the next day morning, Nitin visited the room of Dinanath Sahani. At that time, the room was found locked from outside. On 14.05.2011, in the morning, Sishankumar neighbour of the appellant informed Nitin that rented room of Dinanath Sahani is locked, but from inside some foul odour was emanating, hence, Nitin went to the room of the appellant. He also sensed foul odour coming from the room of the appellant. Then lock of the room was broken. Inside they noticed one lady in the room in unconscious state. On seeing the lady PW-3 Jagdish stated that she was the very same woman seen by him with the appellant Dinanath Sahani.

8. The evidence of PW-3 Jagdish shows that on 12.05.2011 the appellant was seen going with the deceased to his room and the evidence on record further shows that the shop of PW-3 Jagdish was situated just 50 feet away from the room of the appellant. In such case, it was possible for Jagdish to easily see the appellant taking the deceased to his room. The evidence of PW-2 Nitin shows that on 13.05.2011 the room was locked and the evidence of PW-2 Nitin and PW-3 Jagdish shows that in the morning of 14.05.2011 the dead body of Manorama was found lying in the room of the appellant with injuries on her person. The evidence of PW-2 Nitin shows that the appellant alone was residing in the room and the evidence of PW-3 Jagdish shows that the appellant took the deceased Manorama to his room in the evening of 12.05.2011 and in the morning of 14.05.2011 Manorama was found dead in the room of the appellant. In such case, Section 106 of the Indian Evidence Act would come into play.

9. The evidence on record shows that the appellant and the deceased Manorama went into the room of the appellant in the evening of 12.05.2011. On 14.05.2011 Manorama was found dead in the room of the appellant. In such case, the accused has to explain how the deceased sustained injuries and died in his room. 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 principle which underlies Section 106 of the Evidence Act can be applied in such cases. In the case of *State of Rajasthan Vs. Kashi Ram*, AIR 2007 SC 144 : (2006) 10 JT 28 : (2006) 11 SCALE 440 : (2006) 12 SCC 254 : (2006) 9 SCR 501 Supp , 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. In the present case, it is pertinent to note that the appellant has not furnished any explanation at all in relation to this circumstance against him.

10. The learned counsel for the appellant submitted that only on the circumstance of last seen, it cannot be inferred that it was the appellant who committed the crime. In support of his contention, he has placed reliance on the decision of the Supreme Court in the case of *Kanhaiya Lal Vs. State of Rajasthan*, (2014) AIRSCW 1828 : (2014) CriLJ 1950 : (2014) 4 JT 165 : (2014) 2 RCR(Criminal) 180 : (2014) 3 SCALE 598 : (2014) 4 SCC 715 . In the said decision, it was observed as under:--

"12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime...."

On perusal of the said decision, it is seen that therein the deceased was seen with the appellant at about 9.00 p.m. on 31.08.2003. Thereafter, the deceased did not return home and his articles were seen floating in the well in the village. Thereafter, the dead body was taken out from the well. In the present case, not only was the deceased last seen with the appellant in the evening of 12.05.2011 but the dead body of deceased Manorama was found in the room of the appellant. Moreover, it is seen that the appellant locked the door and went away, hence, the facts in the case relied upon and the present case being entirely different, this decision would be of no help to the appellant.

11. The learned counsel for the appellant, thereafter submitted that the landlord PW-2 Nitin should not have broken open the lock and entered the room and instead he should have informed the police and in the presence of the police the lock should have been broken and thereafter, entry made in the room. No doubt PW-2 Nitin did not call the police but his evidence as well as the spot panchanama Exh. 16 clearly show that the lock of the room was broke open and thereafter, on entering the room the dead body of Manorama was found in the room. In this view of the matter, even if Nitin did not break the lock in presence of police and the lock was not seized, it would not affect the prosecution case.

12. Thereafter, the learned counsel for the appellant submitted that Manorama had sustained many injuries and according to the Doctor, some of the injuries can be caused by fist blows while resisting throttling. He submitted that in such

case, Manorama must have made some noise which could have been heard by the neighbours and the fact that no one heard any noise proves that the prosecution case is false. It is not denied by the appellant that he had taken one room on rent from PW-2 Nitin. He has also not denied that he had approached PW-3 Jagdish for securing room on rent and thereafter, he took the room on rent from PW-2 Nitin in Survey No. 27 situated in village Warjegaon. It is also not denied by the appellant that PW-3 Jagdish was also the tenant of PW-2 Nitin and was residing in one of the 30 rooms constructed by Nitin and PW-3 Jagdish ran grocery shop from the said room. The dead body was found in the room of the appellant. As far as noise made by the victim is concerned, there is no evidence on record to show that huts were adjoining each other or were situated so close to each other that any noise made by the victim could be heard in the other rooms. Moreover, it is seen that the deceased was throttled to death. Injuries sustained by her according to the Doctor were caused while resisting throttling. The fact that the deceased was throttled shows that there was not much scope for the deceased to make any noise which could be heard by persons in the other rooms.

13. The learned counsel for the appellant submitted that the evidence of PW-6 PI Darekar shows that the shop of PW-3 Jagdish was situated about 50 "meters" from the room of the appellant hence Jagdish would not be in a position to see the appellant going with the deceased to room of the appellant in the evening of 12.05.2011. However, on going through the original Marathi evidence, we find that PI Darekar has stated that the distance between the room of the appellant and the grocery shop of PW-3 Jagdish was about 50 "feet". 50 feet is such a distance that one person can easily observe and identify persons from that distance. Thus, we find no substance in this submission.

14. Besides the above evidence, the prosecution is relying on the circumstance of extra judicial confession. This extra judicial confession was made by the appellant to PW-2 Nitin. Nitin has stated that he gave one of his rooms to the appellant on rent. PW-3 Jagdish was also one of his tenants. Jagdish informed him that on 12.05.2011 in the evening he had seen the appellant taking one woman to his room. On the next day when he visited the room he found that the room was locked from outside. On 14.05.2011, in the morning, Sishankumar neighbour of the appellant informed him that some foul odour is coming from the room. He then went to the room and broke open the lock and the dead body of a woman was found in the room of the appellant. At that time, the appellant made a phone call on the cell phone of Sishankumar. Sishankumar informed this fact to Nitin. Then Nitin took the phone from Sishankumar to listen to the conversation of the appellant. The appellant stated on phone that he is Dinanath. The appellant further stated that he had committed mistake by committing murder of that woman and he prayed that he may be excused. Thus, through the evidence of PW-2 Nitin the prosecution has proved that extra judicial confession was made by the appellant to PW-2 Nitin.

15. The learned counsel for the appellant submitted that Sishankumar on whose phone according to the prosecution the appellant had made a phone call has not been examined. He submitted that he is an important witness and non-examination of Sishankumar seriously affects the prosecution case. As far as non-examination of Sishankumar is concerned, the evidence of the investigating officer PW-6 PI Darekar is relevant. The evidence of PI Darekar shows that Sishankumar was originally resident of Uttar Pradesh. To secure presence of Sishankumar many attempts were made but for want of his correct whereabouts his presence could not be secured and the investigating officer has filed report to that effect which is at Exh. 36. In any event, it is not the prosecution case that extra judicial confession was made to Sishankumar but it is the prosecution case that extra judicial confession was made to PW-2 Nitin and Nitin has been examined. Looking to the facts and circumstances of this case, non-examination of Sishankumar would not affect the prosecution case.

16. Thereafter, it was submitted by the learned counsel for the appellant that the investigating agency has not obtained call records of the phone of Sishankumar or of the cell phone which was seized from the appellant at the time of his arrest. It is not the prosecution case that the appellant made a phone call to Sishankumar from the mobile phone which was found with the appellant at the time of his arrest. In any event, the phone found with the appellant at the time of arrest did not belong to the appellant but it belonged to one Yogendra Shravan. Yogendra Shravan also could not be traced for want of correct whereabouts. As stated earlier, the presence of Sishankumar also could not be secured. The evidence of PW-2 Nitin shows that he has categorically stated that the appellant made extra judicial confession to him. Nothing has been brought on record to show that PW-2 Nitin had any grudge or enmity against the appellant so as to implicate him falsely. Thus, just because call records of the phone of Sishankumar or of Yogendra Shravan are not on record, it would not affect the prosecution case.

17. It is the prosecution case that the appellant throttled Manorama and caused her death and in the process of throttling her, he also caused various other injuries to her by giving her fist blows. This is borne out by the medical evidence. PW-5 Dr. Shinde conducted the post mortem on the dead body of Manorama. He noticed various abrasions on the right and left side of the neck. In addition, he found abrasions on both elbows and both knees. He found abrasion over chin, right submandibular region and left shoulder. On internal examination, he noticed the following injuries.

"Head:--under scalp haematoma over left frontal region 7 x 5 cm. Irregular and reddish. Brain was intact but congested and oedematous. Neck and Thorax:--- corresponding to external injuries, haematoma present anteriorly to the hyoid bone 3 x 2 cm on right side. 7 x 2 cm on left side, 8 x 5 cm within muscles and glands, thyroid cartilage fractured in midline, associated with extravasation of blood, reddish."

According to the Dr. Shinde, the death had taken place due to throttling.

18. On going through the record, we are of the opinion that there is sufficient evidence to prove beyond reasonable doubt that the appellant committed the murder of Manorama by throttling her. Thus, we find no merit in the Appeal. Appeal is dismissed.