
(2015) 07 BOM CK 0122

In the Bombay High Court

Case No : Criminal Appeal No. 1087 of 2008, Criminal Application No. 1506 of 2013 in Criminal Appeal No. 1087 of 2008 and Criminal Application No. 737 of 2014 in Criminal Appeal No. 1087 of 2008

Gangadhar Krishna Pukale and Others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 31-07-2015

Acts Referred:

Evidence Act, 1872 — Section 106

Penal Code, 1860 (IPC) — Section 201, 302, 34, 498-A

Citation : (2015) 4 BomCR(Cri) 691

Hon'ble Judges : V.K. Tahilramani, J;Shalini Phansalkar Joshi, J

Bench : Division Bench

Advocate : F.R. Shaikh, APP, Advocates for the Respondent

Final Decision : Allowed

Judgement

Dr. Shalini Phansalkar Joshi, J—The Appellants, who stand convicted by the Ad-Hoc Sessions Judge, Solapur by Judgment dated 20th September, 2008 in Sessions Case No. 235 of 2006 for the offence punishable under Section 302 r/w. 34 of the IPC and sentenced to suffer imprisonment for life and to pay fine of Rs. 1,000/- each, in default to suffer S.I. for 3 months; for the offence punishable under Section 498-A r/w. 34 of the IPC and sentenced to suffer R.I. for 2 years and to pay fine of Rs. 1,000/- each, in default to suffer S.I. for 3 months; and for the offence punishable under Section 201 r/w. 34 of the IPC and sentenced to suffer R.I. for 2 years and to pay fine of Rs. 1,000/- each, in default to suffer S.I. for 3 months, by this Appeal challenge their conviction and sentence.

2. Brief facts of the Appeal can be stated as follows:--

P.W. - 1 Vitthal Khamitkar is the brother of deceased Lilawati. Her marriage with Appellant No. 1 had taken place in the year 1990. Appellant No. 2 is the son of Appellant No. 1 from his first wife, whereas, Appellant No. 3 was the mother of Appellant No. 1. After the marriage, deceased came to reside in the house of the

Appellants at Barsi.

3. It is alleged by P.W. - 1 Vitthal that Appellant No. 1 used to take suspicion on the character of the deceased and on that count, he used to ill-treat and harass her. Appellant No. 1 was also not allowing her to conceive, as he was already having one son and one daughter from his first wife. Hence, for some months, after the marriage, deceased stayed in the house of her brother. However, in January, 1992, Appellant No. 1 took her to his house. For 4 to 5 years thereafter, deceased frequently used to disclose about the ill-treatment meted out to her.

4. The incident giving rise to this case took place on 4th July, 2006. On that day, at about 9 pm, P.W. - 1 Vitthal received the message that deceased has sustained the burn injuries and died. Hence, on 5th July, 2006, P.W. - 1 Vitthal went to the house of the Appellants along with his wife and other relatives. There he came to know that dead body of the deceased was lying in the hospital. Hence, from there, he went to the hospital. The Medical Officer, who had conducted the autopsy on the dead body, informed P.W. - 1 Vitthal that deceased was first throttled and thereafter burnt. In view thereof, P.W. - 1 Vitthal went to Barsi Police Station and lodged complaint against the Appellants.

5. On his complaint (Exhibit-19), P.W. - 8 Police Head Constable Uttam Palkar registered C.R. No. 87 of 2006 against the Appellants and handed over investigation of the case to P.W. - 10 API Sadashiv Shelar, who was carrying out inquiry into A.D. No. 36 of 2006, which was registered on the receipt of information of the death of the deceased from Appellant No. 2. In the said inquiry, he has recorded the statements of some witnesses. On the receipt of investigation of this C.R., API Shelar went to the spot of incident and drew Scene of Offence Panchanama (Exhibit-28). From the spot, he collected the broken pieces of window pane, the kerosene can, the burnt pieces of the clothes of the deceased and a match box. Then he went to the hospital; conducted Inquest Panchanama (Exhibit-49) and referred the dead body of the deceased for postmortem examination.

6. P.W. - 11 Dr. Bharat Gaikwad conducted the postmortem examination and opined that the cause of the death was "asphyxia due to throttling and the burns were postmortem". API Shelar collected the Postmortem Report (Exhibit-73). He then recorded the statements of the neighbors and other witnesses, sent the seized muddemal articles to Chemical Analyzer, sought opinion of Dr. Gaikwad in respect of the approximate time of the death and further to completion of investigation, filed Charge-Sheet in the Court against the Appellants.

7. On committal of the case to the Sessions Court, the Trial Court framed charge against the Appellants vide Exhibit-4. The Appellants pleaded not guilty and claimed trial.

8. In support of its case, prosecution examined in all 11 witnesses. Except for P.W. - 1 Vitthal, the brother of the deceased, and P.W. - 6 Chandraprabha, his wife, other witnesses, including Panch to the Spot Panchanama, turned hostile.

The Trial Court, however, relied upon the evidence of brother of the deceased P.W. - 1 Vitthal, his wife P.W. - 6 Chandraprabha and the medical evidence of P.W. - 11 Dr. Gaikwad and convicted and sentenced the Appellants, as aforesaid.

9. Against this Judgment of the Trial Court, the Appellants have preferred this Appeal. During pendency of the Appeal, Appellant No. 3 Jamunabai, the mother of Appellant No. 1, expired and hence Appeal is abated against her.

10. In this Appeal, Appellant No. 1 preferred two Criminal Applications, being Criminal Application No. 1506 of 2013 and Criminal Application No. 737 of 2014, seeking permission to argue this Appeal in person, which permission was granted to him and, accordingly, he was produced before this Court and was heard in person. He has also furnished the notes of written arguments. Though the assistance of Counsel from Legal Aid Panel was offered to Appellant No. 1, he refused to accept the same. Considering that his notes of arguments are elaborate and learned Counsel for Appellant No. 2 Mr. Talkute has also advanced legal submissions on entire facts of the case on behalf of both the Appellants, we respected the wishes of Appellant No. 1 and did not foist on him the Counsel from Legal Aid Panel.

11. Appellant No. 1 has also, in these two Criminal Applications, sought a direction to the Sessions Court to allow him to re-examine P.W. - 11 Dr. Bharat Gaikwad and also to exhibit the xerox copies of the muster roll and attendance letter, which he has obtained from his employer under Right to Information Act, to support his plea that at the time of incident, he was on duty at Sant Muktabai Vidyalaya, Shelgaon, Taluka Indapur, District Pune and not present in the house.

12. As per Appellant No. 1 and learned Counsel for Appellant No. 2, the entire case of the prosecution stands on the circumstantial evidence alone and the circumstances alleged and proved in the case do not form a chain so complete as to leave no other inference except that of the guilt of the Appellants. It is urged that there are several loose ends left by the prosecution in its case; the major loose end being failure of the prosecution to prove the presence of Appellant Nos. 1 and 2 at the time of the incident. It is urged that the Trial Court has relied only on the evidence of P.W. - 11 Dr. Bharat Gaikwad, who has stated that cause of the death was "asphyxia due to throttling and burns were postmortem". In the opinion of learned Counsel for the Appellants, this fact alone cannot be sufficient to prove the guilt of the Appellants beyond reasonable doubt. The Trial Court has not given any finding proving the presence of the Appellants in the house and in such situation, the Appellants deserve to be acquitted of all the charges held proved against them.

13. Per contra, learned A.P.P. for the Respondent/State has supported the Judgment of the Trial Court by submitting that the very factum of the homicidal death of the deceased in the house of the Appellants, while in their custody, shifts burden on the Appellants, under Section 106 of the Evidence Act, to explain the circumstances in which her death has occurred. In this case, it is

submitted that the Appellants have not discharged the said burden and, therefore, the Trial Court has rightly convicted the Appellants.

14. This case is, admittedly, based on circumstantial evidence and the singular circumstance on which the prosecution has placed entire reliance is that of the homicidal death of the deceased. The evidence of P.W. - 11 Dr. Bharat Gaikwad, who has conducted postmortem on the dead body of the deceased, is more than sufficient to prove that she was subjected to throttling and then her dead body was set on fire. His evidence proves that on external examination, he found that pupils were dilated and fixed, tongue was peeping out and was caught within the teeth. The skin was blackened due to soot all over the body, including face and palm. Thyroid cartilage was fractured. There was no presence of soot in trachea or bronchi. He has further deposed that there was no vital line anywhere on the body, which line is a demarcation between the part burnt and the part which is not burnt. It is usually red in colour and appears only when the person has got burns while he is alive. The absence of vital line on the dead body of the deceased, in the instant case, according to him, clearly proves that deceased was not burnt when alive but only after the death.

15. Further, he has deposed that the presence of black soot all over the body also necessarily indicates that it was a case of throttling, as such presence of soot all over the body happens usually in homicidal burns. When the person is alive and set on fire, such person tries to throw away the clothes to avoid the injuries due to burns; so there will not be any evidence of burnt clothes sticking to the body and there may not be any soot on the body surface. As against it, if the dead body is set to fire, as in the present case, the clothes on the dead body were found totally burnt and converted into soot, which was sticking to the body surface.

16. Further, he has opined that the position of limbs in case of burns before the death and burns after the death is different. If the person is set ablaze when he is alive, then because of the heat, proteins present in the muscles and the fiber gets coagulated, thereby causing contractions of the limbs, simulating boxer's attitude, which is also known as "pugilistic attitude". In the present case, he did not find such boxer's or pugilistic attitude, thereby indicating that it was a case of burns after the death. The absence of soot in trachea and bronchi also indicated that she had stopped breathing before she was burnt.

17. Though this witness is cross-examined at length by Defence Counsel, nothing worthwhile is elicited in his cross-examination to challenge his opinion about the cause of death as "asphyxia due to throttling and the burns were postmortem". Therefore, we are inclined to place reliance on his opinion in view of the telltale signs, which he has found to infer that the death of the deceased was homicidal in nature. She was throttled first and then set ablaze.

18. The real question posed before us is "whether prosecution has proved that the Appellants and none else was responsible for the same?".

19. In our opinion, to prove the involvement of the Appellants, it is necessary for the prosecution to prove first, the presence of the Appellants in the house at the time of the incident and also the approximate time of the death. In this case, P.W. - 11 Dr. Bharat Gaikwad is, however, not as certain about the approximate time of her death as he is, about the cause of the death. He has stated that, considering the presence of the rigor mortis, the time of the death of deceased might be more than 24 hours from the time of postmortem. The postmortem was conducted on the next day, i.e. on 5th July, 2006, in between 10 am to 11:50 am. Therefore, if his evidence in examination-in-chief is to be accepted, then the death of the deceased must have taken place on 4th July, 2006 before 10 am. However, in cross-examination, P.W. - 11 Dr. Gaikwad has admitted that, as the rigor mortis was found on the entire body of the deceased, her death might have occurred within 12 to 24 hours from the time of postmortem. It means, her death might have occurred from 10 am onwards on 4th July, 2006 upto 10 am on 5th July, 2006.

20. In view of the above, it is apparent that the prosecution has not succeeded in proving the approximate time of death. If prosecution has done so, then only one can consider whether the Appellants were present in the house at the approximate time of death. Admittedly, Appellant No. 1 is doing service. The allegation of throttling, as disclosed in the complaint (Exhibit-19), is only against Appellant No. 1. Therefore, it was very much essential for prosecution to prove his presence at the time of incident of throttling.

21. Though prosecution has examined P.W. - 3 Mallikarjun Savalgi, P.W. - 4 Jayashree Savalgi and P.W. - 5 Nilawati Yoge, who are the neighbors of the Appellants, none of them have supported the prosecution case. All the three of them were declared hostile and cross-examined by learned A.P.P., but without any success. Their evidence neither proves the approximate time of the death, nor the presence of Appellant No. 1 at the relevant period.

22. Conversely, their evidence proves that on that day Appellant No. 1 has left the house as usual in the morning for going to his work. P.W. - 2 Ulhas Pichake, the Panch Witness to Spot Panchanama, who is also the neighbor of the Appellants, has also not supported the prosecution case. His evidence proves that on 4th July, 2006, at about 4:30 pm, Appellant No. 2 Krishna came to his house and they were chit-chatting. At that time, 4 to 5 ladies were sitting in the court-yard of the house of Appellant No. 1. Those ladies started shouting as they found the smoke emitting from the house of the Appellants. They called Appellant No. 2. Hence, Appellant No. 2 and P.W. - 2 Ulhas rushed to the house of the Appellants. They heard the screams of the deceased from inside of the house. The door of the room from which the screams were emitting was closed from inside. Therefore, he himself, Appellant No. 2 and one another neighbor, Nandu, broke open the door by giving dash to the same. Then they saw the deceased in burnt condition, lying near the kitchen ota.

23. Thus, as per evidence of P.W. - 2 Ulhas, Appellant No. 2 was very much

present with him, outside his house, when they found the smoke coming from the room where the deceased was and the door of the said room was closed from inside. The Spot Panchanama (Exhibit-28) also contains the details to that effect. His evidence does not prove the presence of Appellant No. 1 in the house either at that time, prior to it and/or subsequent to it.

24. Moreover, though prosecution has relied on his evidence and Spot Panchanama to prove that the window pane to the kitchen was broken and two small pieces of glass were seized under Panchanama, as the Spot Panchanama itself proves that the window was having the iron grills, there is no possibility of anyone exiting from that window after setting the deceased on fire.

25. In such fact situation, it was absolutely essential for the prosecution to prove as to how this incident of burns happened. Both, the Investigating Officer and the prosecution, appear to be clue-less about the same. No attempt is made to throw light on this aspect. If the death of the deceased occurred much prior thereto, then there is no evidence to show that at that time at-least Appellant No. 1 was present in the house.

26. Hence, in the absence of clinching evidence proving that at the approximate time of the death of the deceased or even at the time when her body was set to fire, either Appellant No. 1 or Appellant No. 2 were present in the house or immediately before such incident, some one has seen them entering in the house or after the incident, leaving the house, from the mere fact that the deceased has succumbed to homicidal death, on the basis of surmises and conjectures, it cannot be held that as her death has happened in the house of the Appellants, the Appellants alone are responsible for the same.

27. In this respect, we can place useful reliance on the Judgment of the Apex Court in *Mulak Raj and others Vs. State of Haryana*, (1996) 1 AD 619 : AIR 1996 SC 2868 : (1996) CriLJ 1358 : (1996) 1 Crimes 24 : (1996) 2 DMC 402 : (1996) 1 JT 401 : (1996) 1 SCALE 419 : (1996) 7 SCC 308 : (1996) 1 SCR 791 , wherein it was held that, "merely because a dead body was found in the house is no ground for presuming that all the inmates or some of the inmates had committed the crime".

28. The same view is taken by our own High Court in *Shambu Nath Mehra Vs. The State of Ajmer*, AIR 1956 SC 404 : (1956) CriLJ 794 : (1956) 1 SCR 199 , by holding that, "the circumstance that of homicidal death and the circumstance that the deceased and accused were residing together would be of no consequence on failure of the prosecution to prove the presence of the accused at the time of commission of the offence. If the prosecution has not been able to establish the time of death, the prosecution cannot claim that the accused has failed to explain the death of the deceased. Section 106 of Evidence Act cannot and is not a substitute for burden of proof resting on the prosecution".

29. It is really unfortunate that the homicidal death of the deceased is going unpunished. But then the Court cannot get itself swayed by emotions. The Court

must have the hard evidence on record to infer that none else but the Appellants alone are responsible for her death. Here, there is no such chain of incriminating circumstances established by the prosecution with the help of cogent and convincing evidence, to prove that Appellant No. 1 has throttled her and Appellant No. 2 has set her dead body ablaze.

30. Even as regards the motive or the immediate cause for her death, prosecution has not produced any evidence on record. Though prosecution has examined her brother and his wife, as P.W. - 1 Vitthal and P.W. - 6 Chandraprabha, their evidence, at the most, only proves complaint of ill-treatment made by the deceased, that too, immediately after the marriage in the year 1991. As per their evidence itself, in January, 1992, she went to reside willingly in the house of Appellant No. 1. Though for 4 to 5 years thereafter, she has again made disclosure about ill-treatment to her, the alleged incident had taken place in the year 2006, i.e. after the lapse of 10 years there from, there is no evidence to prove that at any time during this period of 10 years, there was such harassment or ill-treatment to her, which is contemplated under Section 498-A of the IPC. For 16 years from the date of marriage, she was residing with the Appellants and the evidence of alleged cruelty brought on record by the prosecution is only in respect of some initial years after the marriage. What happened suddenly for the Appellant No. 1 to commit her murder is not at all explained by the prosecution.

31. It is also pertinent to note that there is not even a whisper of allegation against Appellant No. 2 or even Appellant No. 3 in respect of ill-treatment or cruelty. The only allegations of ill-treatment in the evidence of P.W. - 1 Vitthal and P.W. - 6 Chandraprabha are against Appellant No. 1 alone and those allegations are also pertaining to earlier period, prior to 10 years. Those allegations are also not proved by the prosecution by bringing satisfactory evidence on record.

32. In such situation, though the needle of suspicion points to the guilt of Appellant No. 1, the suspicion, howsoever strong, cannot take the place of proof. Hence, benefit of doubt cannot be withheld from Appellant Nos. 1 and 2. In the ultimate analysis, therefore, this Appeal deserves to be allowed.

33. In view thereof, the Criminal Application No. 1506 of 2013 and Criminal Application No. 737 of 2014 do not survive and, hence, stand disposed of as dismissed. Hence, the order.

34. The Appeal is allowed. Conviction of the Appellant No. 1 Gangadhar Krishna Pukale and Appellant No. 2 Krishna @ Pappu Gangadhar Pukale for the offences punishable under Sections 302, 201 and 498-A r/w. 34 of the IPC stands quashed and set aside.

35. Appellant No. 1 Gangadhar Krishna Pukale and Appellant No. 2 Krishna @ Pappu Gangadhar Pukale are acquitted of all the charges leveled against them.

36. Appellant No. 1 Gangadhar Krishna Pukale be released from the Jail forthwith, if not required in any other offence.

37. Bail Bond of Appellant No. 2 Krishna @ Pappu Gangadhar Pukale is cancelled. Fine amount, if any, paid by Appellant Nos. 1 and 2 be refunded to them.

38. Office to communicate this order to the Appellant No. 1 Gangadhar Krishna Pukale and the concerned Superintendent of Jail.