
(2014) 07 BOM CK 0156
In the Bombay High Court
Case No : Criminal Appeal No. 107 of 2001

Gangaram

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 01-07-2014

Acts Referred:

Evidence Act, 1872 — Section 10, 10, 11, 11, 12, 12
Penal Code, 1860 (IPC) — Section 302, 34, 404

Citation : (2014) ALLMR(Cri) 3876 : (2014) 3 BomCR(Cri) 335

Hon'ble Judges : Anand Vasant Nirgude, J; A.I.S. Cheema, J

Bench : Division Bench

Advocate : N.B. Suryawanshi, Advocate for the Appellant; P.P. More, A.P.P, Advocate for the Respondent

Final Decision : Partly Allowed

Judgement

Anand Vasant Nirgude, J.—This appeal challenges the judgment and order dated 2nd November, 2000, passed by the Additional Sessions Judge, Biloli, in Sessions Case No. 147 of 1993 by which the appellant who was accused No. 1 in the lower Court was convicted for the offence punishable u/s 302 and 404 of the Indian Penal Code (for short "IPC") and sentenced to undergo imprisonment for life etc. There were two accused in the lower Court. Accused No. 1 is the appellant and accused No. 2 was one Laxmi, who was acquitted of the offence. Both these accused were prosecuted for the offence punishable u/s 302, 404 r/w 34 of IPC.

2. The facts leading to this appeal can be narrated as under:-

A village boy noticed a corpse covered with bed-sheet in the vicinity of Davlapur, Tq. Biloli, Dist. Nanded, within local limits of Police Station, Kondalwadi, Tq. Biloli, Dist. Nanded. It was found that the dead-body belonged to one Gangamani of village Bhavani Peth, Tq. Bodhan, Dist. Nizamabad of Andhra Pradesh. The post-mortem report revealed that Gangamani had died three days back and the cause of action was asphyxia due to throttling. It was thus homicidal death and offence of murder was registered.

3. The appellant and other accused were arrested and prosecuted.

4. Let us now give gist of evidence.

The prosecution recorded deposition of eight witnesses. P.W. 2-Bhujangrao Tekale was a Police Patil of village Davlapur, who stated that on information, he went to the spot, where dead-body of a woman was found. He reported the incident to Police of Kondalwadi Police Station.

5. P.W. 4-Laxmanna is husband of the deceased. He stated that he and deceased Gangamani stayed together at village Bhavani Peth, Tq. Bodhan, Dist. Nizamabad. The couple was blessed with two sons and two daughters. This witness further mentioned that about 8 days prior to the death of Gangamani, she made complaint to him that the appellant-Gangaram had outraged her modesty. As per the village practice, a meeting of panchas was called for punishing the culprit. He said that in the said meeting, appellant-Gangaram admitted his guilt and he was sentenced to pay fine of Rs. 600/-. He added that appellant-Gangaram refused to pay fine and asked the panchas to call another meeting etc. After four days from this incident, he said that his wife went missing. He stated that while he was not at home, his wife had left. During the investigation, this witness identified the ornaments of his wife, which were recovered at the instance of appellant-Gangaram. He also identified certain other articles, such as sarees, clothes & spectacles belonging to his wife, which were found near the dead-body.

6. P.W. 6-Bhujangrao Pallematil is another important witness. He is resident of Bhavani Peth and he stated that he knew the deceased and her husband since prior to the incident. He said that an incident of outrage of modesty of deceased Gangamani was reported to him and other elected panchas of the village. He said that he and his other panch friends held a meeting and penalized appellant-Gangaram. He said that 15 days thereafter while he was going to Bodhan with his she-goat, he saw deceased Gangamani and accused No. 2 Laxmi also going towards Bodhan. He said that he noticed that Gangamani was carrying luggage bag in her hand. He said that he learnt from them that they were going to village Moti Peth. He further stated that all of them walked up to village Sangam and from there they boarded a tempo and went up to village Bodhan. He said that they all got down at village Bodhan bus stand. He said that from there he went to his work, whereas deceased Gangamani and accused No. 2-Laxmi went away. He further stated that after he returned to village, he did not notice Gangamani for about two days. He noticed accused Laxmi one day and asked her about Gangamani. He said that since Gangamani did not return home, her children were in distress. He said that accused No. 2-Laxmi told him that appellant Gangaram had asked her to bring Gangamani up to Biloli. For this work, Laxmi was paid Rs. 40/-. Accused-Laxmi told him further that accordingly she and the deceased went up to Biloli where they met appellant-Gangaram. She also disclosed to him that thereafter Gangamani went to village Penta to her daughter. This witness further stated that 4-5 days thereafter police came with

news of death of Gangamani etc. (It is because of this disclosure about accused No. 2-Laxmi's involvement in the case, she was also arrested and was prosecuted).

7. P.W. 3-Sayya Reddy is a goldsmith of village Bodhan. He stated that in the month of May, 1993, on a Saturday, appellant-Gangaram had come to his shop with gold ornaments for sale. He had Mani-Mangalsutra, Katarpalya, Pallapalu and Gutulu. (These are local names of gold ornaments worn by women). He said that he purchased only Mangalsutra from him for Rs. 900/-. He further said that Police then came with appellant-Gangaram to the shop and during investigation enquired about the Mangalsutra. He produced the same before the police for investigation purpose. He identified the same. As mentioned above, this Mangalsutra was later-on identified by P.W. 4-Laxmanna-husband of deceased Gangamani.

8. P.W. 1-Nagnath stated that in his presence appellant-Gangaram made a statement that he would show the place where he had sold the ornaments and he would show the places where he sold and concealed the ornaments belonging to the deceased. Accordingly, the police first went to the shop of P.W. 3-Sayya Raddy and recovered Mangalsutra and later-on the police were led to the house of the appellant where the appellant took out a bag containing some more ornaments, which were ultimately identified by husband of the deceased.

9. Learned Judge of the Trial Court believed the evidence and held that in the facts and circumstances of the case, offence punishable u/s 302 of the IPC was also proved against him. We heard the submissions at Bar. The following points arise for our consideration:-

(i) Whether the evidence on record could connect the appellant with homicidal death of Gangamani?

(ii) Whether the prosecution could prove that the appellant took away and dishonestly misappropriated the ornaments from deceased Gangamani's body?

10. The evidence which we discussed above would indicate that there is no direct evidence against the appellant indicating that he committed murder by throttling her. In such a situation the prosecution generally would depend on circumstance such as the deceased was seen in the company of the appellant/accused last before her death. Another circumstance in this case is brought on record which indicated that the ornaments belonging to deceased Gangamani were found in possession of the appellant, but the finding of the ornament in possession of the appellant is an event that took place subsequent to the homicidal death of the deceased. The question that is posed to the prosecution is whether they could prove that deceased Gangamani was seen in the company of the appellant before her death.

11. In order to throw some light on this, the prosecution depended only on deposition of P.W. 6-Bhujangrao Pallematil. He stated that about 15 days after

the incident of Panchayat, he went up to Bodhan along with deceased Gangamani and accused No. 2-Laxmi. He said that he saw them parting from him at village Bodhan at bus-stand. He did not see them thereafter. He did not know where they went thereafter. All that he stated that during the journey they told him that they were going to Moti Peth. He, however, did not know whether they really went to Moti Peth etc. Thereafter comes the second disclosure by this witness. This time he said that two days thereafter he saw accused No. 2 and had talked with her. Accused No. 2 told him something about deceased Gangamani and the appellant. What she stated to this witness is already narrated above. The question is whether this narration is admissible in evidence.

12. Learned Counsel for the appellant asserted that this disclosure of this witness is inadmissible in evidence because it was a statement of co-accused. He also stated that this disclosure is also hear-say for P.W. 6 and in absence of deposition of accused No. 2, same deserves to be ignored. On the other hand, learned APP asserted that this disclosure is admissible in evidence because this was not confession made by accused No. 2. This was merely a statement in respect of what happened between she and deceased Gangamani, after they got down from tempo at bus-stand of Bodhan and what happened thereafter between deceased Gangamani and the appellant etc. It is, thus, clear that whatever accused No. 2 disclosed to this witness was related to the fact in issue as to whether the appellant came in contact with the deceased soon before her death.

13. The law on this subject is discussed in the judgment of the Supreme Court in the case of State of Maharashtra Vs. Kamal Ahmed Mohammed Vakil Ansari and Others, We would quote para Nos. 13 & 15, which laid down the ratio as under:-

13. Sections 17 to 31 of the Evidence Act pertain to admissions and confessions. Sections 17 to 31 define admissions/confessions, and also, the admissibility and inadmissibility of admissions/confessions. An analysis of the aforesaid provisions reveals, that an admission or a confession to be relevant must pertain to a "fact in issue" or a "relevant fact". In that sense, Section 5 (and consequently Sections 6 to 16) of the Evidence Act are inescapably intertwined with admissible admissions/confessions. It is, therefore, essential to record here, that admissibility of admissions/confessions, would depend on whether they would fall in the realm of "facts in issue" or "relevant facts". That in turn is to be determined with reference to Sections 5 to 16 of the Evidence Act. The parameters laid down for the admissibility of admissions/confessions are, however, separately provided for under the Evidence Act, and as such, the determination of admissibility of one (admissions/confessions) is clearly distinguishable from the other (facts in issue/relevant facts).

14. x x x x

15. Admissions and confessions are exceptions to the "hearsay" rule. The Evidence Act places them in the province of relevance, presumably on the ground, that they being declarations against the interest of the person making

them, they are in all probability true. The probative value of an admission or a confession does not depend upon its communication to another. Just like any other piece of evidence, admissions/confessions can be admitted in evidence only for drawing an inference of truth (See Law of Evidence, by M. Monir, fifteenth edition, Universal Law Publishing Co.). There is, therefore, no dispute whatsoever in our mind, that truth of an admission or a confession can not be evidenced, through the person to whom such admission/confession was made. The position, however, may be different if admissibility is sought under Sections 6 to 16 as a "fact in issue" or as a "relevant fact" (which is the second question which we are called upon to deal with). The second question in the present case, we may clarify, would arise only if we answer the first question in the negative. For only then, we will have to determine whether these confessional statements are admissible in evidence, otherwise than, as admissions/confessions.

14. It was held in this judgment that an admission by the accused would be relevant if it pertains to a fact in issue or a relevant fact. If it is held that the admission of accused No. 2 is pertaining to the fact in issue or relevant fact irrespective of the fact that the statement is hear-say, it would be admissible in evidence. In view of this pronouncement of law, we are not inclined to hold that whatever was stated by the accused No. 2 to P.W. 6 and whatever he stated about it is not admissible evidence. The Supreme Court further mentioned in para No. 15 that the truth of the admission cannot be evidenced through the witness, to whom the same was made. In other words, whatever accused No. 2 informed to P.W. 6, he cannot vouch for truthfulness of it. No one can be sure as to whether what accused No. 2 disclosed to this witness, was truthful or otherwise. So, although we hold that the statement of the accused is admissible evidence in this case, the case of the prosecution would not make significant progress. The prosecution ought to have brought on record independent evidence showing that the accused No. 2 and the deceased thereafter went to village Biloli and they were seen in the company of the appellant. In absence of this evidence, the statement made by accused No. 2 is a very weak piece of evidence and cannot by itself prove that the appellant was seen with the deceased at Biloli before her death. In view of this, point No. 1 would go against the prosecution.

15. In order to prove that the ornaments belonging to the deceased were misappropriated by the appellant, the prosecution must prove that the ornaments that were recovered at the instance of the appellant belonged to the deceased and that the evidence about recovery of these ornaments at his instance was also made. We enumerated the evidence that has been recorded in this regard by the prosecution. Learned Counsel for the appellant criticized the credibility of this evidence. He said that the ornaments which were recovered at the instance of the accused are common ornaments which can be found with every other woman. He also pointed out that the ornaments did not have any particular identification marks. All that the prosecution brings on record is that the husband of the deceased identified the ornaments being her ornaments.

Learned Counsel for the appellant asserted that in the circumstances in this case the identification of the ornaments by P.W. 4-Laxmanna is foregone conclusion. He is bound to accept the suggestion of the police that these ornaments could be of his wife. Learned Counsel for the appellant also contended that there is nothing on record to indicate that when deceased Gangamani left her house for the last time, she was either wearing these ornaments or was carrying these ornaments in her bag. P.W. 4-Laxmanna was not at home when she left the house. He neither stated that his wife had some more ornaments which are kept in the house.

16. Learned Counsel for the appellant is also critical of the evidence regarding seizure of the ornaments at the goldsmith's shop at Bodhan and at his own house. He particularly brought to our notice the admissions given by the goldsmith P.W. 3-Sayya Reddy. This witness admitted that he knew the appellant and his wife since long and that the appellant's wife in particular was his regular customer. He even admitted that on number of previous occasions, she had sold her ornaments to him. The appellant's suggestion is that the ornament which she sold to this witness did not belong to deceased but belonged to his wife.

17. We have serious doubt about truthfulness of this witness when he rather too readily accepted all the suggestions which came in cross-examination from the appellant. While he was cross-examined, he disclosed his real colours. He started supporting the case of the appellant. However, this witness and even the appellant admitted that the ornament in question came to this witness from the appellant.

18. If ownership of the ornament is held to be that of victim/deceased, then this part of the defence of the appellant becomes useless.

19. The remaining ornaments were recovered from the house of the appellant. In the cross-examination of the recovery panch and the Investigating officer, nothing come on record to disbelieve this part of the prosecution case.

20. This brings us to examination of evidence of the prosecution seeking to prove that the ornaments belonged to the victim or deceased Gangamani. Even after having regard to the submissions made by learned Counsel for the appellant, we are inclined to hold that he could not have committed an error when he identified the ornaments. In the circumstances of the case, this witness could have added so many facets to the prosecution case for falsely implicating the appellant. But despite opportunity, this witness did not speak against the appellant. All that he stated before the Court was that the ornaments were belonging to his wife. He had no reason to lie. It is not as if he lied because he wanted to take away the ornaments. The ornaments are not very valuable articles. Soon after dead body of the victim was found, the appellant was in possession of articles from the person of deceased. How he came in possession is especially within his knowledge. He has not discharged the onus on him. In the circumstances offence u/s 404 of IPC must be held to be proved. We are, therefore, inclined to hold

that the prosecution proved their case that the appellant took away ornaments from the dead-body of Gangamani and misappropriated them. The misappropriation is proved. He even sold one of the ornaments and kept others with him. All the ingredients of Section 404 of IPC, thus, are proved. Section 404 of IPC is rather less utilized provision. We would like to quote it here:-

404. Dishonest misappropriation of property possessed by deceased person at the time of his death--Whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years.

21. In view of this, the appeal will succeed partly. We are inclined to acquit the appellant of the offence of murder but would uphold his conviction u/s 404 of the IPC.

22. We heard learned Counsel for the appellant on the quantum of sentence to be awarded. Learned Judge of the lower Court awarded three years rigorous imprisonment for the offence punishable u/s 404 of IPC. Learned Counsel for the appellant contended that having regard to the fact that the appellant has already undergone 19 months' imprisonment till today and the agony of this case since 1993, quantum of sentence should be reduced to period he has already undergone. We are inclined to accept this submission. This case took unusually long time even at trial stage. The incident is of 1993. The Sessions Case was disposed in the year 2000. The appeal is disposed of today in 2014. By this time, the youthful vigor of the appellant would have waned considerably and we are inclined to reduce the quantum of sentence to the period the appellant has already undergone. Hence, the following order is passed:-

(i) The Criminal Appeal is partly allowed.

(ii) The appellant is acquitted of the offence punishable u/s 302 of IPC.

(iii) The appellant's conviction for the offence punishable u/s 404 of IPC is upheld, but the quantum of sentence awarded is reduced to the period already undergone and to pay fine of Rs. 5000/-, in default, rigorous imprisonment for six months.

We are told that the fine is already deposited. Office shall verify whether the fine is paid. In-case, the fine is not paid so far, issue warrant of arrest against the appellant, for undergoing default sentence.

23. Learned Counsel Mr. N.B. Suryawanshi, was appointed to represent the appellant as per order of this Court. We quantify an amount of Rs. 5000/- (Rupees Five Thousand) as his professional fees.