
(1999) 06 BOM CK 0052

In the Bombay High Court

Case No : Criminal Appeal No. 601 of 1995 with Criminal Application No. 3684 of 1998

Haroon Mahatab Jamadar and others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 07-06-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164
Evidence Act, 1872 — Section 3, 45, 59, 8
Penal Code, 1860 (IPC) — Section 302, 34, 498

Citation : (1999) 5 BomCR 900 : (1999) 3 BOMLR 868 : (1999) 3 MhLj 376

Hon'ble Judges : Vishnu Sahai, J;T.K. Chandra Shekhara Das, J

Bench : Division Bench

Advocate : T.E. Mane, for the Appellant; Ms. Usha Kejriwal, Assistant Public Prosecutor, for the Respondent

Judgement

Vishnu Sahai, J.—Through Criminal Appeal No. 601 of 1995, the appellants (Haroon Mahatab Jamadar, Mahatab Ibrahim Jamadar, Sharifa Mahatab Jamadar, Ibrahim Mahatab Jamadar, Ismail Mahatab Jamadar, and Nehru @ Jawarddin Mahatab Jamadar) have challenged the judgment and order dated 22-9-1995, passed by the IVth Additional Sessions Judge, Solapur, in Sessions Case No. 110 of 1995, whereby they have been convicted and sentenced to undergo imprisonment for life, for the offence punishable u/s 302 read with section 34 I.P.C. Through the said appeal, appellant-Sharifa Mahatab Jamadar has also challenged her conviction and sentence of three months R.I. and fine of Rs. 100/- in default, 15 days R.I. for offence u/s 506(ii) I.P.C. The substantive sentences of Sharifa Mahatab Jamadar have been directed to run concurrently.

Criminal Application No. 3684 of 1995 has been preferred for bail by the appellants Ibrahim Mahatab Jamadar, Ismail Mahatab Jamadar and Nehru @ Jawarddin Mahatab Jamadar.

Since, we are finally disposing of Criminal Appeal No. 601 of 1995, we reject

2. In short, the prosecution case runs as under :-

2(A) The appellants-Haroon Mahatab Jamadar, Ibrahim Mahatab Jamadar, Ismail Mahatab Jamadar, and Nehru @ Jawarddin Mahatab Jamadar are real brothers. The appellant-Mahatab Ibrahim Jamadar is their father. The appellant-Sharifa Mahatab Jamadar is their mother. The appellants Haroon, Ibrahim, Ismail and Nehru had a step-brother Babulal who was married to Ashrafbi Jamadar P.W. 3, the solitary eye-witness of the incident.

The deceased Noor Jahan was married to the appellant-Haroon Mahatab Jamadar when she was of three years of age. When she became about 10 years, her father and mother Salima Jamadar, P.W. 6 sent her to the house of the appellants in village Kolekarwadi Taluka Akkalkot District Solapur. After staying for five years at the house of the appellants, Noor Jahan was sent back to her parents' house in village Dodyal, Taluka Akkalkot, District Solapur for bringing Rs. 5000/-, one tola of gold, cot and bed as dowry. Bakshubhai Jamadar P.W. 7, brother of Salima Jamadar P.W. 6 arranged for the clothes of the appellant Haroon and Noor Jahan and also for 1/2 tola of gold and sent her to the house of the appellants. In spite of this, the appellants used to ill-treat Noor Jahan. This was disclosed by Noor Jahan to Salima Jamadar, when she visited her. Thereafter, the appellants Haroon, Ibrahim and Noor Jahan left for Bombay to earn livelihood, where they stayed for about five months and returned to village Kolekarwadi about 15 days prior to Diwali of 1994. During Diwali, Salima Jamadar brought Noor Jahan to her house and the latter disclosed to her that the appellants-Ibrahim and Ismail had misbehaved with her. On the assurance of the appellant-Haroon that he and Noor Jahan would live separately, she sent her. It appears that this was only a ploy for bringing back Noor Jahan and her ill-treatment continued. When Salima and her brother Bakshubhai Jamadar P.W. 7 visited Noor Jahan, she complained to them that the appellants were demanding gold, cot and bed and were harassing her.

2(B) The evidence of Ashrafbi Jamadar P.W. 3 shows that she and her husband Babulal lived in a house opposite to that of the appellants in village Kolekarwadi. She also corroborates Salima Jamadar and Bakshubhai regarding the demand and ill-treatment of Noor Jahan. Her evidence shows that two days after Holi festival, (at about 10 to 11 p.m. on 18-3-1995) her daughter who was suffering from chicken-pox got up to answer the call of nature. On bringing her outside for the said purpose, she heard shrieks coming from the house of the appellants. She went to their house, pushed the door but, found it closed from inside. Consequently, she went from the side of the house of the appellants and from the hole of their roof, saw Noor Jahan lying on the ground. A cloth was stuffed in her mouth and the appellant-Haroon had closed her mouth and had kept his hand on her throat. He was pressing her throat. The appellant-Mahatab and Sharifa were catching hold of each of her upper arms; appellant-Ismail was sitting on her thigh and the appellants Ibrahim and Nehru were sitting on her knees. She saw the said appellants in the light of kerosene lamp which was

burning inside. While she was witnessing the incident, her daughter shouted and she told her that she was coming. On that the appellant-Sharifa came outside; and threatened her not to disclose to anyone what she had seen. Consequently, she went away.

2(C) Next morning (morning of 19-3-1995) Ashrafbi Jamadar heard the noise of neighbouring ladies who were shouting that Noor Jahan was dead. She came outside and found her lying dead on the floor of the house. Froth was coming out from her nostrils, tongue and mouth. Her lips were swollen and there was injury on her neck. When she went inside the house, she did not find the appellants there.

2(D) The evidence of Noormohammed Patel P.W. 1, Police Patil, shows that on 19-3-1995, he came to know that a woman from the house of the appellants was dead. He visited their house and found a dead body. He discovered that the dead person was Noor Jahan and the appellants were not present there.

Consequently, he went to North Akkalkot Police Station where on his information, P.S.I. Nagnath Gaikwad P.W. 9, at 9.45 a.m. lodged a report of unnatural death.

3. The investigation was conducted in the usual manner by P.S.I. Nagnath Gaikwad. At about 10.30 to 11 a.m. same day, he visited the place of the incident; performed the inquest on the corpse of the deceased; and sent it for autopsy. He then prepared the panchanama of the scene of the offence.

Evidence of P.S.I. Nagnath Gaikwad P.W. 9 shows that same day at about 4.30 p.m. Salima Jamadar P.W. 6, mother of the deceased Noor Jahan, lodged an F.I.R. at North Akkalkot Police Station. On the basis of the said F.I.R. a case u/s 302/498A read with section 34 I.P.C. was registered, against the appellants. It is pertinent to mention that same day (19-3-1995) in the afternoon, P.S.I. Gaikwad interrogated the solitary eye-witness of the incident Ashrafbi Jamadar P.W. 3 and on 24-3-1995, got her statement u/s 164 Cr.P.C. recorded by the Special Judicial Magistrate, Solapur.

On 28-4-1995, after completing the investigation, P.S.I. Gaikwad submitted the charge sheet against the appellants.

4. The autopsy on the corpse of the deceased Noor Jahan was conducted on 19-3-1995 by Dr. Manohar More P.W. 5 who found on it the following injuries:-

"1. Scratch mark just below left eye of size 5 cm x 1 cm. It was superficial and fresh.

2. Abrasion 5 cm. x 2 cm. below left eye. It was superficial.

3. Sub-conjunctively haemorrhage both eyes, with abrasion on the left eye ball, just below left eye lid bleeding present.

4. Old healed injury over occiput 2 cm. length."

On internal examination, Dr. More found thorax, pleura, larynx, trachea

bronchial, pericardium and right lung congested. He also found tongue of the deceased clenched between the lower and upper teeth.

In the stomach, Dr. More found semi-digested food material.

In the opinion of Dr. More, the deceased died on account of asphyxia due to suffocation.

5. The case was committed to the Court of Sessions in the usual manner, where the appellants were charged for offences punishable u/s 302 read with 34 I.P.C. and section 498-A I.P.C. The appellant-Sharifa was also charged for the offence u/s 506(ii) I.P.C. They pleaded not guilty to the charges and claimed to be tried.

During trial, in all, the prosecution examined nine witnesses. The solitary eye-witness of the incident Ashrafbi Jamadar was examined as P.W. 3. The learned trial Judge believed the prosecution evidence in respect of the offences punishable u/s 302 read with 34 I.P.C. and 506(ii) I.P.C. and convicted and sentenced the appellants in the manner stated above.

Hence, this appeal.

Aggrieved by their convictions and sentences, the appellants have preferred Criminal Appeal No. 601 of 1995. As mentioned earlier, three of the appellants have applied for bail, through Criminal Application No. 3684 of 1998.

6. We have heard learned Counsel for the parties and perused the entire material on record. After giving our anxious consideration to the matter, we are of the judgment that this appeal deserves to be partly allowed.

The foundation of the conviction of the appellants is the ocular account rendered by Ashrafbi Jamadar P. W. 3. It is on the basis of the recitals contained in her examination-in-chief that we have set out the prosecution case in para 2(8) above. In short, her evidence shows that her husband Babulal was the step-brother of the appellants-Haroon, Ibrahim, Ismail and Nehru and she along with Babulal lived in a house opposite to that of the appellants. On the night of the incident (18-3-1995) at about 10 to 11 p.m. her daughter wanted to answer the call of nature and when she took her outside for the said purpose, she heard shrieks coming from the house of the appellants and from the hole in the roof in their house, she saw in the light of a kerosene lamp, that Noor Jahan was lying down on the ground, a piece of cloth was stuffed in her mouth; appellant Haroon closed her mouth; kept his hand on her throat; pressed her throat; appellants Mahatab and Sharifa were catching hold of her upper arms; appellant-Ismail was sitting on her thighs; and the appellants Ibrahim and Nehru were sitting on her knees. When her daughter called her, she replied that she was coming and on that the appellant Sharifa came outside and threatened her not to disclose the incident to anyone.

7. We have gone through the statement of Ashrafbi Jamadar P.W. 3 and we find that she is a perfectly natural witness of the incident in as much as, she lived in

a house opposite to that of the appellants and had furnished the circumstances in which she saw the incident.

8. We also find that the evidence of Ashrafbi Jamadar P.W. 3 suffers from no blemish so far as the participation of appellants Haroon, Mahatab, Sharifa and Ismail is concerned.

It is true that during cross-examination, it was suggested to her that she was inimical to the said appellants because, the appellant Mahatab was not giving her husband his share of land but, this suggestion was denied by her.

Learned Counsel for the appellants has not been able to assail her evidence in any manner regarding the participation of the said appellants.

9. We however, feel that it would not be safe to rely on Ashrafbi's evidence regarding the appellants Ibrahim and Nehru. In her statement in the trial Court, she has categorically stated that they were sitting on the knees of Noor Jahan to prevent her from making any movement. But, to our dismay, we find that there is an ominous omission regarding this fact, both in her statement u/s 161 Cr.P.C. and u/s 164 Cr.P.C. When cross examined she could give no satisfactory reason for the said omission. It is pertinent to mention that omission u/s 161 Cr.P.C. has been proved by the Investigating Officer P.S.I. Nagnath Gaikwad P.W. 9 and that u/s 164 Cr.P.C. has been proved by Shivraj Mangoli D.W. 1 the Special Judicial Magistrate, who recorded her statement u/s 164 Cr.P.C.

Since in her cross-examination Ashrafbi Jamadar in para 9 admitted that she and the accused were not on visiting terms, it may be that she falsely attributed the said role to the said appellants.

At any rate, in view of the said omission, we feel that it would be prudent to give the said appellants, the benefit of doubt, because, excepting the role of sitting on the knees of the deceased, the prosecution has been able to adduce no evidence which would show that these appellants shared the common intention with respect to the murder of the deceased.

It is well-settled that mere presence does not invoke the application of section 34 I.P.C. For its application, it is necessary that the criminal act committed by one or more persons, should have been committed by them in furtherance of their common intention. If the story of these appellants sitting on the knees of Noor Jahan is excluded, then to repeat, there is no other evidence on record which would show that they shared the common intention to commit her murder.

It would be pertinent here to bear in mind the warning given by the Privy Council in the oft-referred case of AIR 1945 118 (Privy Council) in terms:

"the inference of common intention within the meaning of the term in section 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case."

Applying the said ratio of the Privy Council, we have no hesitation in concluding

that the inference of common intention is not deducible from the evidence on record in the instant case.

10. Mr. Mane learned Counsel for the appellants strenuously urged that the F.I.R. was not lodged at 4.30 p.m. on 19-3-1995 but, lodged later. He canvassed the said submission on the basis of the cross-examination of the Investigating Officer P.S.I. Nagnath Gaikwad P.W. 9 who recorded the F.I.R. Mr. Mane invited our attention to para 8 of the P.S.I. Gaikwad's cross-examination from a perusal of which, it appears that Akkalkot North Police Station where the F.I.R. was lodged and the Court of J.M.F.C. Akkalkot where the F.I.R. was sent, are situated in Akkalkot and the F.I.R. was sent on 23-3-1995 and received in the Court on 7-4-1995. The learned trial Judge in paras 42, 43, 44 and 45 of the impugned judgment has given cogent reasons why on account of mere delay in sending the copy of the F.I.R. to the Magistrate, it cannot be construed that the F.I.R. was ante-timed. In this connection, he has relied upon two decisions of the Supreme Court namely those reported in *Pala Singh and Another Vs. State of Punjab*, , and *Sarwan Singh and Others Vs. State of Punjab*, , where it has been held that merely because, there is a delay in sending a copy of the F.I.R, to the Magistrate, the prosecution case cannot be thrown out.

A Division Bench of this Court of which one of us (Vishnu Sahai, J.,) was a member, in the judgment rendered on 5-4-1999 in Criminal Appeal No. 32 of 1996 *Tulshiram Bhanudas Kambale and others v. The State of Maharashtra*, with Criminal Appeal No. 71 of 1996 *Ganesh Kisan Shirsat @ Paparkar v. The State of Maharashtra*, with Criminal Appeal No. 83 of 1996 *Tulshiram Bhanudas Kambale and others Vs. The State of Maharashtra*, considered in detail the question whether merely as a consequence of the delay in sending a copy of the F.I.R. to the Magistrate, would it be open to the Court to construe mat the F.I.R. was ante-timed. It answered the question in the negative, relying upon the two decisions of the Supreme Court reported in 1997 S.C.C.(Cri.) 3527 *Madru Singh and others v. State of M.P.*, and *Ram Sanjiwan Singh and Others Vs. State of Bihar*, . In the said decisions, it has been held by the Supreme Court that from the cross-examination of prosecution witnesses, circumstances have to be elicited which would show that the F.I.R. was ante-timed and then alone an inference can be reached that the F.I.R. was ante-timed.

In the instant case, from the cross-examination of P.S.I. Nagnath Gaikwad P.W. 9 who recorded the F.I.R. and conducted the investigation nothing could be extracted on the basis of which it may be concluded that there are concomitant circumstances to show that the F.I.R. is ante-timed.

11. Mr. Mane also urged that Ashrafbi Jamadar P.W. 3 is a highly interested witness and therefore, it would be hazardous to accept her testimony. We regret that we cannot accept this contention. The law only provides that the testimony of a interested witness be evaluated with caution and not rejected mechanically. We have exercised that caution and consequently, have given two of the appellants Ibrahim and Nehru the benefit of doubt.

Mr. Mane's contention that since Ashrafbi has falsely implicated these two appellants it would not be safe to accept her testimony vis-a-vis the remaining four appellants, is misconceived. We have not disbelieved her evidence with regard to the presence of the said two appellants but, have only held that the story that they sat on the knees of Moor Jahan, is doubtful and there being no other evidence to show that they shared the common intention with respect to the murder of Noor Jahan, have given them benefit of doubt.

At any rate, the principle *Falsus Uno Falsus Omnibus* does not apply to our country. Since the said two appellants have been given the benefit of doubt, it would be no reasons to throw out her testimony vis-a-vis the remaining appellants. As we have observed earlier, her evidence in respect of them inspires confidence.

12. No other point was pressed by Mr. Mane.

13. In the result :-

(A) Criminal Appeal No. 601 of 1995 is partly allowed. Although we maintain the convictions and sentences of the appellants-Haroon Mahatab Jamadar, Mahatab Ibrahim Jamadar, Sharifa Mahatab Jamadar and Ismail Mahatab Jamadar on the counts they have been found guilty by the trial Court and dismiss their appeal but, we give the appellants-Ibrahim Mahatab Jamadar and Nehru @ Jawarddin Mahatab Jamadar benefit of doubt and acquit them for the offence punishable u/s 302 read with 34 I.P.C. The said appellants are in jail and shall be released forthwith unless wanted in some other case.

We are informed by Mr. Mane learned Counsel for the appellants that appellants-Haroon Mahatab Jamadar and Ismail Mahatab Jamadar are in jail. They shall remain there and serve out their sentences. The appellants-Mahatab Ibrahim Jamadar and Sharifa Mahatab Jamadar are on bail. They shall be taken into custody forthwith and shall serve out their sentences.

(B) Criminal Application No. 3684 of 1998 is rejected.

14. Appeal partly allowed.