

(1987) 08 KAR CK 0037
In the Karnataka High Court
Case No : Cr.A. No. 310/1986

Imamsab Fakrusab Balekai

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 25-08-1987

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 302, 401

Citation : (1987) 3 KarLJ 324

Hon'ble Judges : M. Ramakrishna, J; P. A. Kulkarni, J

Judgement

Kulkarni, J.-The appellant-A1 being aggrieved by the judgment and order of convictions and sentences dated 24-3-1986 passed by the Principal Sessions Judge, Belgaum, in Sessions Case No. 116 of 1985 convicting the appellant-A1 for the offence under Section 302 I.P.C., and sentencing him to imprisonment for life on two counts and for the offence under Section 201 read with 34 I.P.C., to undergo R.I. for one year, has filed this appeal.

2. The material facts are as under:-

Sahebji (P.W. 2) is the mother of Mamtajbi (P.W. 1) and the deceased Muktumbi. The deceased Muktumbi was married to one Mohammedsab of M.K. from Hubli some three years before the incident. She stayed in the house of her husband hardly for a year. As she had not been treated properly, she came back to the house of her mother (P.W. 2) and started staying with her. While she left the house of her husband, she was not carrying and had no children. After the deceased started staying in the house of her mother, she came in contact with her neighbour, A-1 appellant herein, and developed illicit intimacy with him. She became pregnant by A-1 and delivered a child some few months before the incident.

According to the prosecution, the deceased, who had become pregnant and had delivered a child, started saying that she would go to the house of A-1 and live with him as she became pregnant and delivered a child by him. A-1 had already a wife and thus quarrels were going on between A-1 and the deceased on the

deceased insisting upon staying in the house of A-1.

On 1-5-1985 in the morning, the deceased started going along with her child with a handbag containing clothes of her and her child saying that she would go to Bylahongal and A-1 also followed her. According to the prosecution, on that night Sahebji (P.W.2) and her another daughter Mamtajbi (P.W.1), after taking food, went to bed in their house which adjoins the house of A-1 and A-2. At about mid-night, Sahebji (PW-2) and Mamtajbi (P.W.1) heard the cry of Muktumbi from the house of A-1. Mamtajbi (P.W.I) came out of the house on hearing the cry and Sahebji (P.W. 2) also followed her. Mamtajbi asked A-1 as to why Muktumbi shouting and crying. It is alleged that A-1 told her that he had murdered Muktumbi and her daughter. According to the prosecution, A-1 asked them to do what they liked. Thereafter, A-2 is said to have taken dung and cleaned the ground where the blood-stains had fallen. Thereafter A-3, whose house adjoins the house of A-1 on the west, came with his tanga. A-1 and A-3 removed the dead bodies from the house, put them in the tanga, went to the well of Somappa (P.W. 12) and threw them into it. On Friday morning rumours spread that dead bodies of an adult female and a child were found floating in the well of Somappa (P.W. 12) at Hosur. Somappa, on seeing the dead bodies floating in his well, went to Murugod Police Station and lodged a complaint, Ex.P-18. The P.S.I, registered a case, rushed to the spot, got the dead bodies removed from the well and held inquest. Thereafter, the Police got the two dead bodies subjected to personnel medical examination, recorded the statements of various witnesses, drew up various mahazars and charge sheeted A-1 to A-3 for the offences under Sections 302 and 201 read with Section 34 I.P.C.

3. The Magistrate committed the case to the Court of Session at Belgaum.

4. The Principal Sessions Judge, Belgaum, framed a charge against A-1 for the offence under Section 302 read with 34 I.P.C., for causing the death of the deceased Muktumbi and her child Fatima. He also framed a charge against A-1 to A-3 for the offence under Section 201 read with Section 34 I.P.C. The said charges were read over and explained to the accused. They pleaded not guilty.

5. The prosecution in support of its case examined P.Ws. 1 to 18, marked sick P-29 and M.Os. 1 to 23 and sick.

6. The accused claimed to be innocent.

7. The trial Court, on circumspection of the material on record, acquitted A-2. It convicted A-1 on two counts for the offence under section 302 I.P.C., and A-1 and A-3 for the offence under Section 201 read with Section 34 I.P.C. The learned Sessions Judge questioned A-1 and A-3 regarding sentence. He sentenced A-1 for the offence under section 302 I.P.C, to undergo imprisonment for life on two counts and for the offence under section 201 read with Section 34 I.P.C, he sentenced A-1 and A-3 to undergo R.I. for one year. He further ordered that the sentences imposed on A-1 should run concurrently.

8. A-1, being aggrieved, alone has filed this appeal.

9. The evidence of Mamtaj (P.W.I), Sahebji (P.W.2) and Basavaraj (P.W. 4), an Assistant Engineer, proves that the house of P.W.2 is situated on the eastern side and at the fag end of the village Vakkund; that the house of A-1 and A-2 is to the west of the house of P.W. 2 and that the house of A-3 is to the west of the house of A-1 and A-2. The evidence of P.Ws. 1 and 2 and other material on record establishes that Mamtaj (P.W.1), who was also married long back, was staying in the house of her mother (P.W.2) since many years. The evidence of P.Ws. 1 and 2 shows that the deceased Muktumbi had been married to a person from Hubli some three years prior to the incident and she had not been treated properly in the house of her husband and hence she started living with her mother since some two years before the incident. Their evidence further discloses that, when Muktumbi was living with her husband, she was not carrying and had no children at all. Their evidence further establishes beyond doubt that the deceased Muktumbi started having illicit intimacy with her neighbour A-1; that A-1 had got his own wife; that the deceased Muktumbi became pregnant by A-1; that she had delivered a child by name Fatima and that it was about six months old at the time of death. Their evidence further establishes that the deceased Muktumbi, having become pregnant by A-1 and delivered a child, started insisting upon living in the house of A-1. Their evidence proves that A-1 did not like the idea of Muktumbi staying in his own house. Perhaps, he had already a wife and was having children by the legally wedded wife.

10. The evidence of P.Ws. 1 and 2 establishes that on 1-5-1985 in the morning, the deceased Muktumbi left the house with the child Fatima with a hand-bag containing her and her child clothes saying that she would go to Bylahongal. Their evidence further discloses that A-1 also followed her and her child Fatima. Their evidence establishes that A-1, the deceased Muktumbi and her child Fatima did not return to the house on that night. Mamtaj (P.W.1) and Sahebji (P.W.2) stated that, as the deceased did not come back with the child, they took their food and went to bed. Their evidence shows that at about mid-night they heard the cry of Muktumbi from the house of A-1 and both of them got up and stood at the door. They found A-1 also coming out of his house. Mamtaj (P.W.1) questioned the accused as to why her sister was crying and shouting. According to her, A-1 told her that he had murdered her sister Muktumbi and the child and if she disclosed that to any one, she would also meet with the same fate. According to her, thereafter, she went inside and wokeup her mother and her brother and informed them what A-1 had told her. She further states that, within half an hour thereafter, A-2 immediately took dung, went inside and cleaned the ground in order to cause disappearance of blood-stains. She further states that, within one hour thereafter, A-1 and A-3 came with a tonga, put the dead bodies into the tonga and went towards Korikoppa village. According to her, on Friday morning at about 11-30 a.m., she heard about the find of two dead bodies of an adult female and a child in the well in Hosur. She went there and found the dead bodies of her sister and her child Fatima. If Mamtajbi (P.W. 1) had heard the cry

of her sister Muktumbi coming from the house of A-1 and if she had really seen A-1 coming out of his house and saying that he had murdered Muktumbi and the child Fatima, she would not have remained quiet that night, the next day and even on Friday. She does not disclose it to anyone till the Police came and recorded her statement. This very passive conduct of P.W 1 Mamtajbi disproves her evidence that she saw the dead bodies of her sister and her child Fatima lying in the house of A-1, putting them into the tanga and being carried them. She has tried to give an explanation that A-1 had threatened that he would murder her also if she had disclosed the incident to anyone. It is impossible to believe that, when her own sister and her child had been murdered and their dead bodies were being carried in a tanga, she did not venture even to go to Bylahongal which is nearby and inform the Police. She does not even inform any one in the village. Her passive conduct makes her evidence un-natural and untruthful.

11. Admittedly and as can be seen from the evidence of P.Ws 1, 2 and 4, there are many houses round about the house of A-1 and A-2 and A-3. If the cry of Muktumbi could wake up Mamtajbi (PW-1), it could have naturally attracted the attention of neighbours also. The neighbours would not have failed to come at the very time and see something. According to her, none of the neighbours came there at all. She states in her cross-examination that, when she came out and saw A-1 coming out of his house and, when A1 informed her that he had murdered Muktumbi and her child, she went inside the house and woke up her mother and brother. If the cry of Muktumbi made Mamtajbi (P.W.1) to wake up, we do not think that Sahebji (P.W.2) and her son would have continued to sleep till they were woken up by Mamtajbi (P.W.1). This circumstance makes the evidence of Mamtajbi (P.W.1) highly unreliable.

12. She has not stated in her Police statement that when she went back inside the house, her mother and brother were sleeping and she woke them up. She admits that she has stated before the Police that, when she went back inside the house, her mother and brother woke up. According to her, after she heard from A-1 about the murder of her sister Muktumbi and her child Fatima, she went inside the house and did not come out of the house at all. This is highly un-natural. The very fact that, even inspite of seeing A-1 and A-3 carrying the dead bodies in a jataka, she does not bother to make any attempt to know where the dead bodies were taken and she does not even bother to inform anyone else, till her statement is recorded by the Police, makes her evidence highly un-natural, discrepant and untruthful. We are not impressed by her evidence. The trial Court has committed an error in accepting such an un-natural, discrepant and untruthful evidence of Mamtajbi (P.W.1).

13. Sahebji (P.W.2) is the mother of Mamtajbi (P.W.1) and the deceased Muktumbi. She has stated that she heard the cry of Muktumbi at about 11 p.m. from the house of A-1. Mamtajbi (P.W.1), on the other hand, states that her mother and brother were sleeping inside the house and it is only after learning

from A-1 that he had murdered Muktumbi and her child Fatima, she went back and woke up them and informed them about it. The evidence of Sahebji (P.W.2) that she heard the cry of her daughter Muktumbi is rather hard to believe. According to her, she and Mamtajbi (P.W.1) stood at the door itself. According to her, she saw A-1 and A-3 carrying the dead bodies. She has admitted in her examination-in-chief itself that she did not see who went along with the dead bodies as it was dark. She admits in her examination-in-chief that her eye-sight is dim. If so, it is difficult to believe that, after hearing the cry of her daughter Muktumbi, she came out and saw A-1 and A-3 carrying the dead bodies. She states that she remained in the house itself. It is highly un-natural that any mother, who heard the cry of her daughter and later came to know that her daughter and her child were murdered, would remain in the house itself by shutting doors. She stated in her examination-in-chief itself that she came to know on Thursday evening that two dead bodies were floating in the well. She does not bother to go and see immediately and she went there only at about 11 a.m. the Next day. She claims to have learnt from the people who were talking that two dead bodies were found floating in the well. She is not in a position to say from whom she heard the said news. She does not bother to go to the Police Station and give information. She stated in para-4 of her evidence:

Thus this is an indication to show that she has not seen anything at all and she did not know anything at all and it was only on seeing the dead bodies of her daughter and her child Fatima floating in the well that she realised that they had been murdered. Her statement was recorded late. Therefore, her evidence, in our opinion, sounds highly untruthful and un-natural. Therefore, the trial Court has committed an error in acting upon such discrepant, un-natural and untruthful evidence.

14. Gurappa (P.W. 3) has stated that the deceased Muktumbi and A-1 were moving together and Muktumbi had delivered a child by A-1 some 6-7-months prior to the incident. According to him, the deceased was insisting that she would stay in the house of A-1 and on account of that there were quarrels between A-1 and the deceased. He has stated that at about 9 p.m. on the date of incident he was sitting at the door of his tea shop; that he saw A-1 and Muktumbi coming from the side of Bylahongal and that Muktumbi was carrying the child in her hand. He states in the examination-in-chief itself that he did not see who went into whose house. He did not support the prosecution fully. He was declared hostile. He has denied that A-1 made any extra-judicial confession statement before him that he had murdered the deceased and her child. His evidence hardly inspires any confidence.

15. Basavaraj (P.W. 4) is the Assistant Engineer who has drawn the sketch of the scene of offence.

16. Dr. Shantappa (P.W. 5) conducted p.m. examination over the dead bodies of the deceased Muktumbi and her child Fatima. His evidence and P.M. report pertaining to the dead body of Muktumbi would go to show that cut injuries

started from the upper border of the sternum and from the right shoulder onwards. He also found vertebral column cut transversely at the junction of 7th cervical and 1st thoracic vertebrae. The spinal cord was also cut at the same level. The membranes and brain were congested. He has stated that the said injuries found on the deceased Muktumbi were sufficient in the ordinary course to cause death of any person. He conducted Personal Medical examination over the dead body of the child Fatima. He stated that the cause of death was due to asphyxia on account of closing of mouth and nose. There is no serious cross-examination. Therefore, his evidence coupled with P.M. reports conclusively prove that the deceased Muktumbi and the child Fatima were murdered and suffered Homicidal death.

17. Dyamappa (P.W.6) has been declared hostile.

18. Mallappa (P.W.7) has attested inquest panchanamas Exs.P-10 and P-11. He has also attested the scene of offence panchanama, Ex.P-12.

19. Veerappa (P.W.8) has acted as panch along with P.W. 7. P.W. 9 Basappa has attested the panchanama, Ex.P-15, under which the clothes found on the dead bodies were seized.

20. Maruti (P.W.11) is a panch who has attested the panchanama, Ex.P-17 under which tube-light from the street electric pole was seized.

21. Somappa (P.W. 12) is the person in whose well the dead bodies were found and who has lodged the complaint, Ex.P-18. That the dead bodies were found floating in his well, is not disputed.

22. Shivappa (P.W. 10) is a panch who has attested the panchanama, Ex.P-16, under which a sickle and a plastic bag containing clothes said to have been produced by A-1 were seized. He is a person residing in Murugod. He has acted as a panch regarding finding of articles. Vakkund is far away from Murugod. The very fact that he comes from far off place and the Police failed to take the local persons to act as panchas and that, according to him, A-1 led the Police and panchas including himself to his house and produced a sickle and a plastic bag from inside the hay-stack, makes his evidence unbelievable and untruthful. The trial Court has committed an error in acting upon such evidence.

23. Thus the prosecution has miserably failed to establish beyond doubt that A-1 murdered the deceased Muktumbi and her child Fatima and that A-1 and A-3 removed the dead bodies and threw them in a well. Therefore, the prosecution, has failed to establish that A-1 and A-3 have committed any offence either under Section 302 or 201 I.P.C., read with Section 341.P.C.

24. It is only A-1 that has come up with the present appeal. Now the question is whether A-3 who has not filed any appeal against his conviction and sentence is also entitled to get the benefit of discussion of evidence by this Court while considering the appeal filed by A-1.

25. This Court in JILANI v STATE OF KARNATAKA (1978(2) Kar. L.J.,121.) has held as follows:

"While dealing with a Criminal Appeal filed by only one of the convicted accused persons, if the Court finds that there is no evidence worth the name to sustain the convictions of not only the accused who has appealed, but also the other accused who have not-appealed, the Court can, acting under Sections 401 and 482 Cr.P.C. 1973, also set aside the convictions and sentences passed on the other accused who have not appealed."

Similar is the principle laid down in the cases reported in A.I.R. 1952 Calcutta, 835 and A.I.R. 1932 Lahore 615.

26. In SUNILAKHYA CHOWDHURY v H.M. JADWET AND ANOTHER (A.I.R. 1968 Calcutta, 266.), the Calcutta High Court held as follows:

"Even if a party does not apply to the High Court in revision but the said case is brought before the Court by some other party, nothing would stand in the way of High Court to exercise its revisional or inherent powers to make such orders as may be necessary for the ends of justice. There is no form of injustice that the long arms of the Court cannot reach and the inherent power of the Court is ex debito justifies to dispense real and substantial justice for the Administration of which alone Courts exist."

27. Therefore, even though A-3 has not preferred any Appeal, he is also entitled to be acquitted as the material on record does not even remotely indicate that A-3 carried the dead bodies of the deceased Muktumbi and her child Fatima in his tanga and threw them in the well of Somappa (P.W. 12).

28. Under these circumstances, the judgment and order of convictions and sentences passed on A-1 and A-3 by the Principal Sessions Judge, Belgaum, in Sessions Case No. 116 of 1985 are liable to be set aside. In the result, we make the following.

ORDER

This Criminal Appeal is allowed. The judgment and order of convictions and sentences imposed on A-1 and A-3 impugned in this appeal are set aside. Both A-1 and A-3 are acquitted of all the charges levelled against them. A-1 appears to be in custody. He is ordered to be set at liberty forthwith. A-3 if in custody is also ordered to be set at liberty forthwith. The Order of disposal of properties made by the trial Court stands good.

Appeal allowed.