
(2010) 05 BOM CK 0068
In the Bombay High Court
Case No : Criminal Appeal No. 238 of 2008

Jamsing Hulya Barela (Present in Jail)	APPELLANT
Vs	
The State of Maharashtra	RESPONDENT

Date of Decision : 03-05-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 302

Citation : (2010) 2 Crimes 433 : (2011) 8 RCR(Criminal) 2912

Hon'ble Judges : S.S. Shinde, J; S.B. Deshmukh, J

Bench : Division Bench

Advocate : S.K. Adkine, for the Appellant; N.R. Shaikh, APP, for the Respondent

Final Decision : Allowed

Judgement

S.B. Deshmukh, J.—The appellant (accused) aggrieved by the judgment and order of conviction and sentence, passed by the learned Ad-hoc Additional Sessions Judge, Amalner, District Jalgaon, in Sessions Case No. 25 of 2006, dated 25.7.2007 has preferred the present appeal. By the impugned judgment, the appellant was convicted for the offense punishable u/s 302 of Indian Penal Code ("IPC") and sentenced to suffer imprisonment for life and fine of Rs. 5000/- in default of payment of fine, to suffer rigorous imprisonment for six month.

2. The prosecution case, in brief, is as under:

(A) The accused was employed as a servant by PW 3 Bhagwan for agricultural work. PW 3 Bhagwan is resident of Amalner and holds landed property within the area of Kamod Shivar. Accused was engaged through one Bhaidas, on the salary of Rs. 1400/- per month. Arrangements of accused were made in the machine room situated in the field. Accused, along with deceased Khetalibai, started residing in the said Machine Room.

(B) On 30.3.2006, accused and Khetalibai reached the house of PW 3 Bhagwan

and informed him that they are going to their native place. Accordingly for two days, the accused and Khetalibai were not present in the field property.

(C) On 1.4.2006 PW 3 Bhagwan and his brother went to the field and noticed that accused and Khetalibai were present in the field. On inquiry, accused informed them that they had returned at 3 p.m. PW 3 Bhagwan asked the accused to fetch water and thereafter returned to home.

(D) On 2.4.2006, PW 8 Swati and other females went to the field for work. On asking for the drinking water by other females, PW 8 Swati went to the Machine Room to fetch a water. She opened the door of Machine Room and noticed blood stains on the soil of the said room. She also noticed dead body of Khetalibai lying in the Machine Room. She got frightened, returned to home and informed her uncle PW 3 Bhagwan about the incident.

(E) PW 3 Bhagwan, thereafter, approached the Police and along with them reached the field. They noticed blood stains on the soil, dead body lying in the machine room, stone, axe, wooden Mogari lying on the spot and injuries on the head of Khetalibai. On suspicion, PW 3 Bhagwan lodged a complaint against accused on 2.4.2006 (Exhibit 18) at Ama lner.

(F) Based on the said complaint, Amalner Police registered Crime No. 39 of 2006 against the accused for the offence punishable u/s 302 of IPC. PW 13 API Nagrale of Amalner police Station investigated the matter, visited the spot, drew inquest panchanama (Exhibit 21) so also spot panchanama (Exhibit 13). He seized stone, wooden Mogari, axe, clothes on the person of deceased, blood stained soil from the spot of incidence. During investigation he recorded statements of witnesses and arrested the accused. He seized the shirt of accused, which allegedly was worn by accused at the time of incident. He sent seized articles to the Chemical Analyzer for its report.

(G) After completion of investigation, charge sheet was submitted before the learned Judicial Magistrate (F.C.) Amalner, against the accused, who, in turn, committed the case to the Court of Sessions.

(H) On 9.2.2007, vide Exhibit 7, charge was framed against the accused for the offence punishable u/s 302 of IPC. Plea of the accused was recorded. He pleaded not guilty and claimed to be tried.

3. To bring home the guilt, prosecution examined in all fourteen witnesses. PW 1 is Raghunath Bhavrao Patil (Exhibit 12) - a panch witness of the spot panchanama. PW 2 is Pravin Vedu Patil (Exhibit 14) - a panch of recovery of clothes. PW 3 is complainant Bhagwan Bhavrao Patil (Exhibit 17). PW 4 is Deepak Lalchand Patil (Exhibit 19), a panch witness of the spot panchanama. PW 5 is Bhaidas Nana Barela (Exhibit 20), a son of deceased and witness of inquest panchanama. PW 6 is PSI Mushtaq Ahmad (Exhibit 23), who registered a crime against the accused. PW 7 is Police Constable Satyawar Bhaurao Pawar (Exhibit 24), who carried the seized articles to the Chemical Analyzer. PW 8 is Swati

Shankar Patil (Exhibit 25), niece of PW 3 Bhagwan. PW 9 is Dr. Ramchandra Savkare (Exhibit 26), who performed autopsy on the dead body of Khetalibai. PW 10 is Shrawan Nago Patil (Exhibit 30) - a panch witness, who was declared hostile and cross examined by the prosecution. PW 11 is Digambar Patil (Exhibit 31), an Advocate, who can talk Pawari language and translate the same. PW 12 is Rekhabai Jamsing Barela (Exhibit 32) - wife of accused, who also turned hostile and was cross examined by the prosecution. PW 13 is Shivdas Nagrale (Exhibit 33), Assistant Police Inspector, who investigated the crime. PW 14 is Police Inspector Dayaram Bhoite (Exhibit 37), who also investigated the crime.

4. The learned trial Judge, recorded evidence of all prosecution witnesses as said above so also statement of the accused u/s 313 of the Code of Criminal Procedure, heard learned Counsel and learned Public Prosecutor and found the accused guilty of the offence charged. He, accordingly, recorded his conviction and sentenced the accused as narrated in the opening paragraph of this judgment. Aggrieved, thereby, the accused / appellant has preferred the present appeal.

5. The Supreme Court has laid down guidelines from time to time in regard to the finding of guilt solely on the basis of circumstantial evidence in number of cases. Leading judgment is in the matter of Hanumant Vs. The State of Madhya Pradesh, wherein the law was laid down in the following terms:

...It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

Again in Sharad Birdhichand Sarda Vs. State of Maharashtra, , Supreme Court laid down the law in the following terms:

A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra where the observations were made - "Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be" and "must

be" is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

These two judgments have been quoted and followed by the Supreme Court in the matter of Alope Nath Dutta and Others Vs. State of West Bengal, .

6. The case of the prosecution in the case on hand, is based on certain circumstances which the trial court found to have been established and sufficient to warrant a conviction of the appellant. The circumstances brought on record by the prosecution and high lighted by the trial court are as follows:

(II) Deceased was last Seen alive in the company of the accused.

(III) Seizure of incriminating articles from spot of incident.

(IV) Seizure of Shirt of the accused stained with blood.

(V) Ascendance of the accused after occurrence

7. We have heard learned Counsel for the parties. We have gone through the evidence. From the evidence of PW 3 Bhagwan it has been revealed that he holds agricultural land within vicinity of village Kamod jointly with his mother. It is irrigated land having two wells around 9 Acres. There is a Machine House (Engine House) near one of the well. PW 3 Bhagwan employed appellant/accused on monthly salary of Rs. 1400/- p.m. The appellant was brought to PW 3 Bhagwan for this employment by PW 5 Bhaidas. The appellant was residing in the machine house a month prior to the incident of occurrence. Along with the appellant, one lady was also residing. Her name was "Khetalibai" however PW 3 Bhagwan used to call her as "Bhabhi". PW 8 Miss Swati niece of PW 3 Bhagwan also corroborates the evidence of PW 3 Bhagwan that appellant along with Bhabhi was residing in the Machine House. It is pertinent to note that PW 3 Bhagwan and PW 8 Swati, are not claiming that appellant and Bhabhi were husband and wife, neither they were introduced to them as husband and wife. On 30th March, 2006 Bhabhi had been to the house of PW 3 Bhagwan at 07.00 a.m, they informed PW 3 Bhagwan that they are going to their village and accordingly left. PW 3 Bhagwan further states that on 1st April, 2006 appellant and Bhabhi returned to his agricultural land. PW 3 and his brother had been to the

agricultural land on 1st April, 2006, they met appellant. On their inquiry appellant informed PW 3 that he returned back at 03.00 p.m. We have also seen evidence of PW 8 Swati. According to her on 1st April, 2006 she took lunch along with the appellant Bhabhi and others. After lunch PW 8 Swati left for her home. In our opinion from the evidence of PW 3 Bhagwan and PW 8 Swati it can be fairly said that on 1st April, 2006 they have seen Khetalibai alive in the company of the appellant however at around 03.0 p.m. PW 3 Specifically gives time that he was informed by the appellant that they returned at 3.00 p.m. PW 8 Swati claims that she took lunch with appellant, Bhabhi and others on 01.04.2006. Thus, it can be said that deceased Khetalibai was alive in the company of the present appellant around 03.00 p.m. on 1st April, 2006.

8. From the evidence of PW 8 Swati it appears that on 2nd April, 2006 she found dead body of Khetalibai in Machine House. She informed to PW 3 Bhagwan. We have also seen evidence of PW 5 Bhaidas (Exhibit 20). This witness has identified the deceased person as his mother Khetalibai. The investigating officer has recorded the First information Report at the instance of PW 3 Bhagwan. It is at Exhibit 17. This first information report is lodged by PW 3 Bhagwan on suspicion. We have seen the spot panchnama Exhibit 13. This spot panchnama Exhibit 13 has been proved. From the spot panchnama, it appears that Machine house is measuring 10x10 feet, having a door towards northern side. In this Machine House, some articles were lying. They were stone stained blood, wooden batten (Mogri) and axe. Wooden Batten was also stained with blood. Blade of Axe was also carrying blood stains. The blood was spilled in this Machine house. Investigating Officer and Panch witness also found some agricultural equipments i.e. starter of electric motor etc. in the Machine House. Along with this Chulha and some house hold articles were also found. Incriminating articles i.e. stone stained with blood, axe and wooden batten i.e. articles No. 1 to 3 were seized under panchnama. Among the panch witnesses Raghunath Patil has been examined on behalf of the prosecution as PW 1 (Exhibit 12). Dead Body was sent for the postmortem report on behalf of the prosecution. PW.9 Dr. Savkare is examined. He has proved the postmortem report (Exhibit 27). From the postmortem report, following were injuries noticed by PW 9 Dr. Savkare.

- 1) Lacerated wound over forehead at left side above eyebrow oblique size 3 cm x 2 cm x 1 cm.
- 2) Lacerated wound over occipital region size 5 cm x 3 cm x 2 cm. with fracture of skull occipital regional and brain matter out of skull.
- 3) Lacerated wound over right wrist vertically size 3 cm x 2 cm x 1 cm with fracture radius.
- 4) Lacerated wound over the left wrist size 5 cm x 3 cm x 2 cm transversely.
- 5) Lacerated wound over posterior aspect of shoulder left size 5 cm x 2 cm x 2 cm transversely.

6) Abrasion over the knee both size anterior aspects 2 x 1 cm.

From the evidence of inquest panchnama (Exhibit 21), Postmortem report (Exhibit 27) and oral evidence of Dr. Savkare, it is clear that circumstance No. (I) unnatural death of Khetalibai is established on behalf of the prosecution. We have considered the evidence of Dr. Savkare PW9. We have taken into account proximity of time, in relation to circumstance No. (II). This circumstance No. (II), in our opinion, does not help the prosecution.

9. From the evidence of Investigating Officer PW 13 and spot panchnama Exh.13, it appears that alleged incriminating articles i.e. blood stained stone, axe and wooden batten (Mogri) were seized by the prosecution. This circumstance No. (III) i.e. seizure of incriminating articles No. 1 to 3 however, is not material. This is because, these articles were seized under panchnama (Exhibit 13) found lying in the Machine House on 2nd April, 2006. In other words, these articles were not discovered at the instance of appellant by resorting to Section 27 of the Indian Evidence Act. Another Aspect is that these articles were forwarded to the Chemical Analyzer. We have seen evidence of PW 7 Satyawan Bhaurao Pawar (Exhibit 24). He was Police Constable at the relevant time, attached to Amalner Police Station. According to him, on 16.05.2006 he had received seized articles in crime No. 39/2006 for carrying them to the office of Chemical Analyzer along with forwarding letter. From the evidence of PW 13, Mr Nagrale API, it is clear that on 03.04.2006 Constable Mr. Mahajan has produced clothes found on the dead body of Khetalibai. The clothes were stained with blood. They were seized under panchnama Exhibit 22. Thus, the alleged incriminating No. 1 to 3 i.e stone, wooden batten and axe stained with the blood and the clothes were forwarded to Chemical Analyzer with PW No. 7 M. S.B. Pawar.

10. PW 13 Mr. Shivdas Nagrale has been examined on behalf of the prosecution to prove circumstance No (IV) i.e seizure of the shirt stained with blood allegedly worn by the accused at the time of the commission of the crime. This shirt was seized under panchnama and was forwarded to the Chemical Analyzer. From the record we have noticed that Exhibit 40 is the communication addressed by the Chemical Analyzer to police Inspector, Amalner Police Station.

On behalf of the prosecution, it is alleged that appellant/accused while in custody, has made a disclosure statement which led to discovery of his shirt concealed by him. Prosecution also claims that this shirt was discovered at the instance of the appellant and allegedly was worn by the appellant while committing the crime. This shirt was stained with the blood. In support of this contention, on behalf of the prosecution, reliance is placed on the evidence of PW 2 Mr. Pravin Patil (Exhibit 12), panch witness and API Mr. Nagrale PW 13 Investigating Officer. We have seen memorandum (Exhibit 15) and discovery panchnama of the shirt allegedly worn by the appellant at the time of commission of crime (Exhibit 16). We have considered the admissible part of evidence (Exhibit 15) i.e. memorandum. Such discovery of the shirt in fact is from the agricultural land wherein standing crop was found while recording such

panchnama. Such discovery, in fact, cannot be accepted to have been made u/s 27 of the Evidence Act. However, this discovery which led in seizure of shirt is of no consequence for the prosecution. This is because we have seen two reports of the Serologist (Exhibit 40) and (Exhibit 41). Exhibit 41 report of the Chemical Analyzer is dated 18.12.2006. This Chemical Analyzer had received a bottle with blood labeled as "Blood of Khetalibai". This Chemical Analyzer has reported that blood group of the blood i.e contained in the bottle could not be determined. Result was inconclusive. In other words, no blood group could be detected of deceased Khetalibai by Chemical Analyzer. With great care and caution, we have examined other Report also. This report clarifies that around eight articles/exhibits were received by the Chemical Analyzer stained with blood. Among these eight exhibits three were alleged incriminating articles i.e. wooden batten (Mogari), axe and stone. Two exhibits were Saree and blouse Exhibit 6 and Exhibit 7 found on the dead body of Khetalibai. Important was the exhibit 8 full Shirt allegedly worn by the appellant at the time of commission of crime and discovered at the instance of appellant u/s 27. Chemical Analyzer has reported by this (Exhibit 40) that blood found on all these articles/exhibits i.e. Wooden Batten (Mogri), stone, axe, Saree, blouse and Shirt of the accused found stained with human blood, however, blood group could not be determined. Thus, if report (Exhibit 41) and (Exhibit 40) are considered together only inference can be drawn that blood group of deceased Khetalibai could not be determined and blood found on the incriminating articles 1, 2, 3, Saree, Blouse and shirt of the accused also could not be concluded. Clinching evidence that blood of deceased was found on the shirt of accused/appellant discovered at his instance, thus could not be proved by the prosecution. This missing link or evidence has faltered the prosecution case. Resultantly, in our view, circumstance No. (III) and (IV) could not be said to have been proved on behalf of the prosecution. Thus, these two circumstances are not proved against the appellant.

11. According to prosecution, murder of Khetalibai had been committed in the intervening night of 01.04.2006 to 02.04.2006. The dead body of Khetalibai was found on 02.04.2006. Indisputably, the appellant was arrested on 08.04.2006, by Police Inspector Dayaram Bhoite (Exhibit 37). Prosecution also claims that after occurrence i.e. after 02.04.2006 accused was absconded. According to PW 13, Mr. Nagrale, he tried to trace the accused and came to know that accused was admitted at the relevant time in hospital at village Badwali. He accordingly visited place Bawni. It is not in dispute that investigation was thereafter taken over by Mr. Nagrale, API on 11.04.2006. We have also seen evidence of PW 14 Mr. Dayaram Bhoite P.I. After registration of the crime, he carried out investigation for some time. According to him, he learnt that accused was admitted to the hospital, situated in a State of Madhya Pradesh. On inquiry, he came to know that appellant was discharged from the hospital. From the evidence, it appears that on 08.04.2006 accused was brought by the police. He has not testified as to which police official or constable brought the accused to him, neither said police officer is examined. This PW 14 Bhoite recorded

supplementary statement of some witnesses and statement of Rekhabai i.e. wife of the appellant. Thus, in our opinion, PW 13 Nagrale, did not cause arrest of appellant on 08.04.2006. He did not search for accused. Mr. Bhoite Police Inspector whose evidence, we have considered, is also not helpful to the prosecution to prove circumstance No. (V) that accused was absconding from 02.04.2006 till 08.04.2006. Except statement of PW 13 API Nagrale that on 02.04.2006 accused was not present in a Machine House, there is absolutely no evidence brought on record by the prosecution to show that appellant was absconding. In our view, this circumstance is also not proved by the prosecution.

12. In our view, circumstance No. (I) i.e. unnatural death of Khetalibai and circumstance No. (III) seizure of incriminating articles No. 1 to 3 are of no consequence. Circumstance No. (IV) i.e. seizure of Shirt of the accused is irrelevant. So far as last circumstance i.e. Ascendance of the accused is also not proved on behalf of the prosecution beyond reasonable doubt. In our view, conviction recorded by the trial court needs to be quashed and set aside. Once, it is found that circumstance the appellant accused must get the benefit of doubt as held in the matter of Jiten Besra v. State of West Bengal reported in 2010 (2) Supreme 244. At this stage, it is also apposite to rely on the judgment of Apex Court in the matter of Sohel Mehaboob Shaikh v. State of Maharashtra reported in AIR 2009 Supreme Court 2702. Facts in the reported judgment are nearer to facts in the case on hand. Ratio of this judgment squarely applies. We have considered the judgments cited on behalf of respondent-State in the matter of Inayatulla Minoddin Shaikh v. State of Maharashtra reported in 2004 (1) Bom.C.R. (Cri) 867 and another judgment in the matter of Sheikh Jahangir Ali s/o Shaikh Burhan v. State of Maharashtra through Police Station officer reported in 2001 (Supp. 2) Bom.C.R. 280. We have also taken into account judgment relied on behalf of the appellant-accused in the matter of State of Rajasthan Vs. Kashi Ram, .

13. In view of the view which we have taken, the appeal filed on behalf of the appellant requires to be allowed by quashing and setting aside the judgment, conviction and sentence imposed upon the appellant.

14. The appeal is allowed. Judgment of conviction and sentence imposed upon the appellant in Sessions Case No. 25/2006 by the Learned Ad hoc Additional Sessions Judge, Amalner, District Jalgaon is quashed and set aside. The appellant is acquitted for the offence of Section 302 of Indian Penal Code. His Bail Bonds stands canceled. Fine, if paid, by the appellant be refunded to him. The appellant is set at liberty/ set free, if does not require in any other offence.

15. We quantify Rs. 3,000/- (Rs. Three thousand only/-) towards fees and expenses to be paid to Shri S.K.Adikine, learned Advocate (*amicus curiae*) for the appellant. He be paid accordingly. We further direct Registrar (J) of this Court to transmit copy of this judgment and order to the appellant today itself, through the authority concerned.