

(1992) 03 BOM CK 0091

In the Bombay High Court

Case No : Criminal Appeal No. 678 of 1988

Kamal Bhanudas Rajguru

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 26-03-1992

Acts Referred:

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

Citation : (1993) CriLJ 3410

Hon'ble Judges : R.G. Sindhakar, J;M.L. Dudhat, J

Bench : Division Bench

Advocate : Deepak Girme and Smt. Shilpa Malwankar, for the Appellant; Mrs. S.S. Keluskar APP., for the Respondent

Judgement

Dudhat, J.—The appellant-original accused No. 1 in this case has preferred this appeal against the order of conviction and sentence dated 23-6-1987 passed by the learned Sessions Judge, Pune in Sessions Case No. 65 of 1987.

2. The accused in this case was charged under S. 302, IPC along with the accused No. 2 for commission of offence of murder. Both the aforesaid accused were also charged under S. 201 read with S. 34, IPC for causing disappearance of the body of the child after commission of offence of murder. The trial court acquitted accused No. 2 and convicted accused No. 1 under S. 302, IPC for the said offence i.e. murder of her own child aged about 8 days and sentenced her to suffer RI for life. The trial court also convicted the accused No. 1 under S. 201, IPC and sentenced her to suffer RI for one year. The trial Court ordered that both these sentences to run concurrently. Against the aforesaid conviction and sentence the present appellant preferred the present appeal.

3. Mr. Girme, the learned counsel appearing on behalf of the appellant contended that the trial court erred in convicting the accused under S. 302 as also 201 of the IPC, though in fact there is no evidence to that effect. It was contended on behalf of the appellant that in this case there is no direct evidence to show that the appellant caused the death of her own child - newly born male child.

According to the appellant each and every circumstance relied upon by the prosecution can be explained on the hypothesis of innocence and this being the position the appellant deserves to be acquitted of all the charges levelled against her.

4. On the other hand Mrs. Keluskar, learned A.P.P. appearing on behalf of the State, contended that the evidence as led by the prosecution is sufficient to convict the accused person more particularly if one takes into consideration the conduct of the accused. In order to understand both these rival contentions in their proper perspective, it is desirable to scan the evidence as led by the prosecution.

5. In this particular case the first information report is filed by P.W. 9, PSI Rajendra Joshi, Deccan Gymkhana, Pune. According to our opinion this particular witness had no first hand information about the offence but after the receipt of the complaint this witness started investigation and on the basis of his investigation this witness has filed the first information, which is at Exh. 23. This witness in his deposition has produced two documents which are at Exhibits 24 and 25. Exhibit 25 produced by him is a letter addressed by the Security Officer to the Sub-Inspector of Police Kondwa Police Chowki. In the said letter it was stated that in the morning of 9th November, 1986 Principal Nambiar of Kendriya Vidyalaya, Khadakvasla Pune informed that the watchman Shri D. S. Shinde of the school has reported to him that a dead body of a newly born child was buried in the school compound. It was further stated in the said letter that the body was again removed from the pit where it was kept by a woman named Kamal Bhanudas Rajguru original accused No. 1, present appellant. In the said letter further it was stated that one Shri Madhav Vithal Bhosale and Shri Rahim Karim Pathan buried the dead body of the child. In the last para of the said letter it was stated that the accused No. 1, Mahadu Bhosale and Rahim Karim Pathan along with the dead body of the child are being handed over for further investigation. This letter was sent on the same day i.e. 9th November 1986, to the Kondwa Police Chowki and after receipt of the aforesaid letter the Sub-Inspector Joshi P.W. 9, started carrying out investigation. According to our opinion Exhibit 25 letter addressed by the Security Officer to the Sub-Inspector Kondwa Police Chowki dated 9-11-1986 shall be the first information report as this is the letter wherein information about the alleged cognizable offence was given to the police station on the basis of which subsequent investigation commenced. According to our opinion the statement given by the investigating officer Shri R. S. Joshi P.W. 9 dated 10-11-1986 is a report of investigation done subsequently on the basis of the aforesaid letter which is at Exh. 25 and, therefore exhibit 23 dated 10-11-1986 cannot be treated as first information report under S. 154 of the Criminal Procedure Code. In our discussion we will treat Exhibit 25 as the first information report and not Exhibit 23.

6. The prosecution examined P.W. 1 Kisan Rajguru who is a resident of Ahmednagar District. This witness has stated that he is the father in law of

accused No. 1, that his son Bhanudas was married with accused No. 1. This witness further stated after the marriage accused No. 1 used to live at her parents house for a long period of about 2 months. He further stated in his deposition that Kamal had left for parental home at village Thopati which is at a distance of about 14 miles from his residence about 1 1/2 years before the incident and she never returned. This witness appears to have been examined by the prosecution to lend support to the theory that the child born to Kamal accused No. 1 was illegitimate child which was not begotten out of wedlock between Bhanudas and accused No. 1. In his cross-examination the defence brought out omission that the said witness never disclosed in his statement before the police that accused No. 1 Kamal had left his house about 1 1/2 years before the incident and thereafter she had never returned to his house. This omission has been proved through the investigating officer. If this omission is left out, there is nothing in his deposition to support the version of the prosecution that Bhanudas had no access to the accused No. 1 Kamal at the time when the child was conceived. Further it is pertinent to note that in this particular case the prosecution has not examined Bhanudas the husband of the accused No. 1 and, therefore, the evidence of this witness is of no significance whatsoever to arrive at a conclusion that the newly born child of accused No. 1 on 2-11-1986 was not out of the wedlock between Bhanudas and accused No. 1.

7. The prosecution has also examined one more witness to prove the case that the newly born child was not born out of the wedlock between Bhanudas and accused No. 1. For that purpose they have also examined P.W. 3 Amriksingh who was working as a manager at the site of the construction work which was going on in N.D.A. Campus. In his deposition he has stated that the construction of the staff quarters commenced somewhere in November 1985 and was practically completed in November 1986. In the aforesaid construction number of labourers were engaged. One mason named Raosaheb Jadhav was also engaged by him for carrying out the work of construction of the site. However, the said Shri Raosaheb Jadhav left the job few months before the construction was completed. According to this witness Shri Jadhav was married person and used to quarrel and fight with his wife under intoxicated condition. The said Shri Jadhav again joined the construction work when the construction work was about to complete. From the earlier portion of his deposition the construction of the staff quarters was almost completed in November 1986 and thereafter somewhere near about in the month of November 1986 this Raosaheb Jadhav must have again returned on site to work as a mason. This witness stated that when Raosaheb Jadhav returned in November 1986 he was accompanied by accused No. 1 and he represented this witness that accused No. 1 was his second wife. Accused No. 1 and the said Shri Jadhav were living in a shed on the construction site and accused No. 1 also used to do construction work as a labourer. According to this witness accused No. 1 lived with Shri Jadhav in the shed only for about 3-4 days and thereafter she left the same place but still she used to attend the work as labourer thereafter. However, Shri Jadhav left the construction site within 3-4

days round about same time, when the accused No. 1 left and he used to attend the work for few days thereafter. In the cross-examination the defence brought out some contradictions from the statement before the police wherein he stated that he had asked Shri Jadhav and the accused No. 1 to quit and go away. The said contradiction was proved by the defence through investigating officer Shri Joshi P.W. 9. According to our opinion taking the evidence of this witness as a whole is of no consequence in proving the illegitimate relationship between the accused No. 1 and the said Shri Raosaheb Jadhav. From the deposition of this witness it is clear that for the first time this witness saw accused No. 1 accompanied Shri Jadhav somewhere in November 1986. From the evidence as led by the prosecution it is clear that in fact the accused No. 1 delivered the child on 2-11-1986 and therefore even assuming for a while that the accused No. 1 stayed with Shri Jadhav in November 1986, it is impossible to come to a definite conclusion that the child was conceived out of the illegitimate relationship between the accused No. 1 and Shri Jadhav. Therefore after scanning the evidence of this witness P.W. 3 Amriksingh and deposition of P.W. 1 Kisan Rajguru we are of the opinion that the prosecution failed to prove that the child which was born to accused No. 1 on 2-11-1986 was not legitimate child. According to our opinion since there is no evidence on record to show that Bhanudas had no access to his wife accused No. 1 and since the prosecution failed to examine Bhanudas her husband, presumption is that the child born on 2-11-1986 was out of the wedlock between the accused No. 1 and the said Shri Bhanudas and therefore not illegitimate child.

8. The prosecution examined Dattu Shinde, the watchman in the Kendriya Vidyalaya. This witness for the first time saw few persons burying the child. This witness stated that on 9-11-1986 when he was returning from his duty at about 8-30 a.m. he saw small crowd of some men and women. According to him there were two women and 2 men. He went near the group and noticed that a dead body of the infant was being buried. He, therefore, made inquiries. He stated that he was told by accused No. 2 that a new infant was born to accused No. 1 and since the infant died they were burying the said child in the pit which they have excavated in the open ground. He told these four persons that it was not proper on their part to use the premises of Kendriya Vidyalaya for burying the child and thereafter he went to the Principal of the Institution and reported the matter, to the principal. The Principal thereafter handed over a note to this witness and directed this witness to deliver the same to the Security Officer. He thereafter handed over the said note to Corporal Yadav who was on duty at the Security Office. Shri Yadav thereafter immediately went to the spot watched that spot and at that time they saw accused No. 1 carrying the dead body of the infant in her hand. Accused No. 2 was also accompanying her. However, two male persons who were there on the earlier occasion were not present at that time. Corporal Yadav thereafter took two women along with the infant to the Security office and thereafter informed the Deccan Gymkhana police station. Thereafter police from Kondwa police station came to the security office and took custody of

the dead body of the child and two women. In the cross-examination of this witness, defendant brought out certain omission that this witness had not stated before the police that he was told by accused No. 2 that the infant was newly born child of accused No. 1 and that the infant is being buried. The defence also brought certain omission of this witness to the effect that this witness did not disclose that he saw two women and two men on the spot, that upon giving the information at the security office by this witness Corporal Yadav accompanied him and both of them went towards the spot and they saw these two accused persons carrying away the infant before they actually reached the spot. The aforesaid omissions were proved by the defence through the investigating officer P.W. 9 P.S.I. Joshi. After taking into consideration the evidence as a whole, though this witness the prosecution has proved that at about 8-30 a.m. on 9-11-1986 two male persons and accused Nos. 1 and 2 were engaged in burial operation of the dead body of the infant child of accused No. 1. At this point we may also point out that in the statement under S. 313 of the Cr.P.C. the accused No. 1 had specifically stated that this infant child was born to her out of her matrimonial wedlock with Bhanudas. In fact she has given the description as to how she moved from place to place in search of her mother and ultimately she came to the spot where the construction was going on, where she delivered this child. That after the delivery of the child, child expired. We have already pointed out earlier that prosecution failed to prove that the child which was born on 2-11-1986 was illegitimate child.

9. Dr. Pherwani P.W. 4 who carried on post-mortem examination on the child, stated that the death of the infant was due to traumatic shock to intra abdominal haemorrhage due to blunt injury to the abdomen .However, he also stated in para 12 of his deposition that even by application of breast pressure or by hand on abdomen region it would result in causing death of the infant. The prosecution has led no evidence whatsoever to show that the accused No. 1 caused the death of the infant. In view of the aforesaid position and more particularly with the possibility expressed in the medical evidence by Dr. Pherwani there is no evidence on record on the basis of which necessary inference could be drawn that the accused No. 1 caused death of the newly born child. On the contrary as per the medical evidence such death of the infant child could be caused by application of breast pressure or by hand on abdominal region. That means such an injury which resulted in the death of the infant might have been also caused by accident in sleep. In view of this position we are of the opinion that in this case the prosecution has failed to prove that the appellant-accused No. 1 caused the death of the infant child born to her on 2-11-1986. If the child expires and if the accused No. 1 with the help of other persons tried to bury the child, the provisions of S. 201 are not attracted to the present case.

10. In the result, we allow the appeal, set aside the conviction and sentence passed by the trial court and direct that the accused No. 1 Kamal be released forthwith, if not required in any other case.

11. Appeal allowed.