
(2009) 08 BOM CK 0031
In the Bombay High Court
Case No : Criminal Appeal No. 1275 of 2003

Mahesh Jayavantrao Aher	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 14-08-2009

Acts Referred:

Penal Code, 1860 (IPC) — Section 302

Citation : (2009) 08 BOM CK 0031

Hon'ble Judges : Bilal Nazki, J;A.R. Joshi, J

Bench : Division Bench

Advocate : R. Dhuru, for the Appellant; P.H. Kantharia, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

A.R. Joshi, J.—The present criminal appeal is preferred by original sole accused challenging his conviction in Sessions case No. 186 of 2002 for the offence punishable u/s 302 of Indian Penal Code. Said impugned Judgment and order was passed by learned Additional Sessions Judge, Nashik on 8th May, 2003 convicting the appellant accused for the offence punishable u/s 302 of Indian Penal Code and sentencing him to suffer imprisonment for life and to pay fine of Rs. 1,000/- in default to suffer further R/I for three months.

2. Prior to discussing the rival arguments, it would be profitable to have the case of the prosecution, narrated in nutshell and also it would be profitable to have some admitted factual position so far as the evidence laid before the learned trial Sessions Court, is concerned.

3. It is the case of the prosecution that during the period from 9 p.m. of 14th July, 2002 till 2.00 p.m. to 15th July, 2002 at Ambedkar Nagar, Devla, Taluka Devla, District Nashik, appellant accused committed murder of his father by intentionally/knowingly causing his death by means of the assault with the help of one wooden implement locally known as "Mogri". According to the prosecution

appellant accused was addicted to liquor and was not having any notable avocation for his livelihood and was in fact quarreling and at times had assaulted the deceased i.e. his own father. The appellant accused then aged about 28 years was not settled in life and as such his father the deceased had assisted him in starting one poultry business. However, such poultry business was not conducted properly and was ultimately shut down and about few months prior to the date of incident which occurred on or about 14 and 15th July, 2002, the appellant accused had taken some casual job of a driver. Also according to the case of the prosecution and the evidence of prosecution witnesses, almost all the relatives of the appellant accused, during the relevant period the appellant accused was staying with his parents and his other brother and sisters were staying separately. Admittedly, prior to the incident the parents of the appellants had been to some last rites occasion at the matrimonial house of mother of the accused and deceased father came back home at Devla on the night of 14th July, 2002 and his mother overstayed at the place of her relations and came back to her house only after knowing the incident of the assault and demise of her husband. Reportedly, on the night of 14th July, 2002 appellant accused and his father the deceased, were at home and allegedly according to the case of the prosecution one Smt. Ajjaya P.W.7, neighbour of the appellant had been to his house. That time she enquired regarding the wife of the deceased and could notice that deceased and appellant accused were only persons present at the house and that deceased was angry as his wife had not come back and on that appellant accused had warned the deceased not to speak any ill against his mother. Also according to the prosecution, this was one of the circumstances linking the appellant accused with the offence of murder as on the night prior to the incident only appellant and his father were present in the house.

4. According to the prosecution, on the next day i.e. on 15th July, 2002 in the afternoon one Smt. Parvatibai, P.W.8, real sister of the deceased had visited the house of deceased at about 3.00 p.m. and noticed that the front door of the house of deceased was closed and as such enquired with the lady residing next door and revealed that since earlier night nobody had opened the door of the house of the said deceased. On knowing this said P.W.8 Smt. Parvatibai went to the rear door of the house of the appellant and also called by taking name of the appellant accused as Balu and that time she revealed that appellant accused was inside the house and he came out from the rear door. After entering the house from the rear door she noticed that her brother was lying in the drawing room on the mattress in the pool of blood and he had sever injuries on his head and other parts of the body. Noticing the said ghastly scene she became over frightened and came out of the house and narrated the incident to one Balu Ramchandra and asked him to give message to the son and daughter of the deceased. Subsequently, on that evening on 15th July, 2002 sons and daughter of deceased came to Devla and thereafter a complaint came to be lodged with police. Said complaint was recorded by Kalwan Police Station at C.R.No.85 of 2002 for the offence punishable u/s 302 of Indian Penal Code and it was lodged by one

Hemant, another son of the deceased and younger brother of appellant accused. In the said complaint which is registered as F.I.R. at 8.00 p.m. on 15th July, 2002, it is specifically mentioned as to said Hemant P.W. 6 knowing the incident through P.W.8 Smt. Parvatibai. In the said F.I.R. a strong suspicion has been raised against the appellant accused, brother of the complainant, as he must have committed the murder of his own father by means of some wooden object.

5. During the investigation of the matter statements of various witnesses were recorded including statement of P.W.7 Ajjaya neighbour and P.W.8 Smt. Parvatibai, sister of the deceased. Scene of the offence of panchanama and inquest panchanama were drawn and the cloths of deceased, which were completely smeared with blood were taken charge of, also the blood samples were taken. According to the prosecution, there was lot of blood split on the walls and also on photo frame and also on the mattress and on the ground. This factual position is significant while considering the involvement or otherwise of the present appellant accused and more significant in the light of factual position that accused was put under arrest after about two days i.e. the night of 17th July, 2002 and that his cloths were not taken charge of under any panchanama. It is also the case of the prosecution that on 20th July, 2002 accused made a voluntarily statement and produced one wooden object, commonly known as "Mogri", an implement used for the purpose of washing the cloths by hammering the cloths. In short, it is the case of the prosecution that the appellant accused had assaulted his father with the help of one wooden implement. The articles seized during the investigation were sent for Chemical Analysis and on completion of investigation charge sheet was filed before the Court and the matter was committed to the Court of Sessions.

6. During the trial, total 13 witnesses were examined by the prosecution. However, for the purpose of the present appeal and considering the factual position, which is detailed here under, substantive evidence of only P.W.8 Smt. Parvatibai is of much importance and which is required to be scrutinized in order to ascertain the complicity of the appellant accused. During the arguments learned Advocate for the appellant accused put much reliance on the admitted factual position and also placed reliance on the deficiencies of the prosecution in collecting the evidence, so far as the arrest and cloths of the accused are concerned. In order to appreciate the argument as to the establishment of guilt of the accused in the present case, only on surmises, conjectures and suspicion, certain factual position is required to be mentioned.

7. According to the case of the prosecution, appellant accused was repeatedly drunkard and was not having a noticeable avocation and was quarreling with his father and at times had assaulted his father and once had broken his arm. On the night prior to the incident, accused and his father were alone at home and it was witnessed by neighbour P.W.7 Ajjaya. On the day of the incident, in the afternoon allegedly P.W.8 Smt. Parvatibai noticed the presence of appellant accused in the house as he opened the rear door for her and thereafter he left

the place and she noticed the deceased, her brother lying in the pool of blood. It is a factual position that the F.I.R. gives the name of said P.W.8 Smt. Parvatibai as knowing the said incident and finding the dead body for the first time on 15th July, 2002. However, statement of said P.W.8 Smt. Parvatibai came to be recorded by police after four days and only on 19th July, 2002. Admittedly, the entire case of the prosecution is based on circumstantial evidence as there is no direct eye witness to the incident of assault.

8. The first circumstance being the appellant accused was first seen in the company of his father the deceased when he was alive on the night prior to the day of incident. Second circumstance being the accused opened the door for his paternal aunt P.W.8 Smt. Parvatibai in the afternoon of 15th July, 2002 and then left the home and that time said P.W.8 could notice for the first time the dead body of the deceased. Third circumstance being the discovery of wooden implement known as "Mogri", allegedly used by the appellant for the commission of the offence. It is an admitted position that there is no independent witness examined by the prosecution as to give the account of events in immediate proximity of the occurrence of the assault. It is also factual position that though it is not the case of the prosecution as to the appellant accused was absconding, he came to be arrested only after two days though specifically his name was mentioned in the F.I.R., as the suspect. It is also an admitted position that there is no panchanama regarding arrest of the accused and as to seizure of his cloths. This is significant when admittedly the dead body was found in the pool of blood and the cloths of the dead body were entirely smeared with blood and in all probability the blood must have splashed on the cloths of the assailant. From this point of view no recovery of any such cloths of the appellant, is significant mitigating circumstance to the case of the prosecution and it must be said that this circumstance has not been properly appreciated by the trial Sessions Court.

9. Apart from the above, the delayed recording of the statement to P.W.8 Smt. Parvatibai is also another mitigating circumstance to the case of the prosecution. At the cost of repetition it must be mentioned that she was all along available from 15th July, 2002 till 19th July, 2002 and that her name was appearing as the witness, as mentioned in the F.I.R.

10. During the arguments a strong suspicion has been raised as to such circumstance whether being sufficient to attract the guilt of the accused and during arguments on behalf of the appellant accused, it is submitted that the substantive evidence of prosecution witness is not of such a status to rule out any other possibility then the involvement of the appellant accused. In other words, it must be mentioned that though there was a strong suspicion against the appellant accused, as to he being the assailant, such suspicion could not have been taken as a proof, as has been erroneously done by the trial Sessions Court.

11. On the aspect as to whether there was a deliberation by the brother and sisters of the appellant accused for taking his name as the assailant, it is

submitted on behalf of the appellant that there should have been an authentic evidence produced by the prosecution as to immediate disclosure of the contents of the F.I.R. to the concerned nearest Magistrate within 24 hours of the recording of such complaint. On this aspect, there is nothing on record to suggest that such copy of F.I.R. was immediately sent to the Magistrate and there is no substantive evidence to that effect. By pointing out this circumstance, it is submitted on behalf of the appellant that a suspicion can be raised as to P.W.8 Smt. Parvatibai witnessing the accused coming out of the house after opening the rear door of the house. This is more so in view of no immediate recording of her statement by the police.

12. Considering the above admitted position and considering the status of the substantive evidence produced before the Court and considering the mitigating circumstances as to delayed recording of statement of P.W.8 Smt. Parvatibai and delayed arrest of appellant accused and failure of prosecution to take his cloths, leads us to hold that there is a suspicion as to involvement or otherwise by the appellant in the offence of murder. At the cost of repetition, it must be mentioned that though there is strong suspicion against the appellant still it cannot be taken as an evidence against the accused when admittedly the case is based on circumstantial evidence and there are mitigating circumstances to the case of the prosecution as mentioned above.

13. Lastly, it must be said that there is no any apparent motive proved by the prosecution in order to establish the guilt of the appellant accused beyond reasonable doubt when the case is based on circumstantial evidence and on this count also the reasonable doubt is raised on behalf of the accused and in that event, in our opinion the benefit of doubt must go in favour of the accused.

14. For the above reasons, we hold that the trial Sessions Court had erred in convicting the appellant accused for the offence punishable u/s 302 of Indian Penal Code. Consequently, the present appeal is allowed with following order:

ORDER

- i. The appeal No. 1275 of 2003, is allowed.
- ii. The appellant accused Mahesh Jayavantrao Aher is acquitted of the offence punishable u/s 302 of Indian Penal Code in Sessions Case No. 186 of 2002. The Judgment and order passed by the 4th Additional Sessions Judge, Nashik dated 8th May, 2003, is quashed and set aside.
- iii. The appellant accused Mahesh Jayavantrao Aher shall be released from the jail custody if not required in any other matter.
- iv. Fine amount if already paid, shall be returned back to the appellant accused.