

(2012) 10 BOM CK 0062
In the Bombay High Court
Case No : Criminal Appeal No. 222 of 2000

Mangal Karad

APPELLANT

Vs

The State of Maharashtra [Copy to be served on Public
Prosecutor, High Court of Judicature of Bombay, Bench at
Aruangabad]

RESPONDENT

Date of Decision : 04-10-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311

Evidence Act, 1872 — Section 106, 165

Penal Code, 1860 (IPC) — Section 302, 304A

Citation : (2013) ALLMR(Cri) 1255 : (2013) 1 BomCR(Cri) 642

Hon'ble Judges : T.V. Nalawade, J

Bench : Single Bench

Advocate : Umakant B. Deshmukh holding for Mr. U.B. Bondar, for the
Appellant; N.B. Patil, APP for State, for the Respondent

Final Decision : Allowed

Judgement

T.V. Nalawade, J.—The appeal is filed against judgment and order of Sessions Case No. 82/99 which was pending in the Court of Sessions Judge, Latur. The Sessions Court has convicted and sentenced the appellant for offence punishable u/s 304-A of I.P.C. Both sides are heard. this Court has thoroughly and carefully examined the original record of the case.

In short, the facts leading to the institution of the proceeding can be stated as follows.

The present appellant-accused is the wife of original complainant Vinayak. Their marriage took place about 5 years prior to the date of incident. Deceased Chaitanya was son of this couple and he was aged about 11/2 years at the relevant time. Allegations are made that accused was little bit whimsical. She used to pick up quarrels with husband and in-laws and she used to do strange things. About 8-10 days prior to the incident in question, there was allegation

against the accused that she had committed theft of ornaments of a child from the house of one Smt. Sagrabai. The bracelet of the said child was however returned few days prior to the date of incident. There are allegations that on one occasion, accused had attempted to commit suicide when she had suspicion that the husband had kept relations with other woman.

2. On 5/6/99, the deceased was seen with the accused in the bed of the accused at about 10-30 to 11-00 p.m. by her mother in law. The mother in law was sleeping on the first floor of the house. On that night, husband of the accused was sleeping in the field. On 6th June, 1999, at about 5.30 a.m. Aylubai, the mother in law of accused noticed that accused and deceased were not present in the house. This lady had suspicion that some untoward incident must have happened and so, she started crying. The neighbours and the relatives of Aylubai gathered there.

3. Search was made for the accused and the deceased. The dead body of deceased Chaitanya was found in the well of one Namdeo Karad which is situated at a distance of about 1 Km. from the village. Manik, brother of Vinayak gave report about the A.D. to Gategaon police station at about 9.45 a.m. A.D. No. 157/99 came to be registered. There was suspicion that accused had jumped with the child into the well but they could not find other dead body in the well.

4. Police prepared spot panchanama on 7/6/99. Inquest panchanama was prepared and dead body was referred for post mortem examination. On 7/6/99, at about 3 p.m. accused was found sleeping in standing crop of one Sharad Patil. Even after giving many calls to her, the accused did not respond and she was virtually shifted in a bullock cart to the village in the evening time.

5. On 7/6/99, Vinayak gave report against accused that she had thrown Chaitanya into well and she had caused death of Chaitanya. Crime No. 48/99 came to be registered on the basis of this report for offence u/s 302 of IPC against appellant accused. Post mortem report shows that Chaitanya died due to drowning. Statements of some witnesses like Aylubai, the husband of accused, Manik and others came to be recorded. On 8/6/99, the accused came to be formally arrested. After completion of investigation, charge sheet came to be filed for offence u/s 302 of IPC.

6. In the trial Court, prosecution examined all 10 witnesses. Accused took defence of total denial. The trial Court has believed all the prosecution witnesses. Trial Court has however, held that the accused has committed offence punishable u/s 304-A of IPC.

7. The Advocate of the appellant mainly argued on medical evidence and he submitted that there is conflict between medical evidence and the oral evidence given on the incident of "last seen". Aylubai [P.W. 7] has given evidence that she had last seen deceased with the accused at about 10.30 to 11 p.m. and at about 5.30 a.m. of next day, both were not present in the house. The record like A.D. report and the evidence of prosecution witnesses show that dead body of

Chaitanya was noticed in the well at about 6 to 7 a.m. of 6/6/99. The dead body was found floating in the water of the well. Thus, if the prosecution witnesses are believed, it can be said that prior to 6 a.m. of 6/6/99, the dead body of Chaitanya had appeared on the surface of the water of the well. and, the dead body had appeared on the surface of the water within 7-8 hours of the incident of last seen.

8. Dr. Omprakash [P.W. 1] conducted post mortem examination on the dead body of Chaitanya. This witness has deposed in the cross examination that the dead body comes to surface of water after minimum 24 hours of the drowning. This medical evidence was not disputed by the APP and no further explanation was obtained in respect of this evidence. The judgment of the trial Court shows that the trial Court has referred opinion given on page no. 135 in Modi's book of medical jurisprudence [20th edition]. On one hand the trial Court has accepted that generally, time of 24 hours is required for appearance of dead body on surface of water after drowning and on the other, the trial Court has picked up some passages from the aforesaid book to form its own opinion. In view of the contents of the aforesaid book, the trial Court has observed that the possibility of appearance of dead body on the surface of water earlier than 24 hours cannot be ruled out. For giving such opinion, the trial Court has considered circumstance like [1] It was a dead body of a child aged about 11/2 year; [2] The incident took place in June- the summer season when the water is generally hot and [3] the depth of water was 27 ft. which might have created some upward current in the water. By making such observations, the trial Court has rejected the opinion given by doctor [P.W. 1].

9. It is true that the opinion of expert like doctor is not binding on the Court and it may not be particularly binding when it is on the point of time of death. However, it needs to be kept in mind that if there is direct evidence on the time of death, the Court can reject the medical opinion and rely on the direct evidence. However, in the case like present one, when there is no opinion as to exact time of death, when time needs to be ascertained, on other science about appearance of dead body on the water after drowning, it cannot be said that the conflict between oral evidence about "last-seen" and medical evidence is of the same nature. When in a case like present one, the Court has doubt about the opinion given on the basis of other circumstances, the Court can use Section 165 of Evidence Act and if the Court is not satisfied by putting some questions to the doctor, then the Court may use even provision of Section 311 of Cr. P.C. and examine some expert on that point. If such procedure is adopted by the Court, no prejudice will be caused to the defence and defence will not be taken by surprise. The prejudice will be certainly caused to the defence if the Court uses a book on medical jurisprudence, uses some passages from the book and gives its opinion first time in the judgment.

10. In the present case, the dead body was noticed in the well at about 6-7 a.m. of 6/6/99. The post mortem was conducted on 7/6/99 at about 10 a.m. No

opinion on approximate time of death is brought on record in the evidence of doctor [P.W. 1]. The evidence of the doctor and post mortem report show that there was watery fluid in stomach, the stomach was distended with water and in the large intestine there was faecal matter. As the doctor has not given opinion about approximate time of death after taking the last meal and as there are aforesaid circumstances, the approximate time of drowning needs to be ascertained on the basis of general science, the time required for appearance of the dead body on the water due to various circumstances.

11. Time is matter of importance in such case. The case was filed for murder of Chaitanya. In such a case, medical evidence is expected to give some estimate as to how long the deceased has been dead. When case rests on circumstantial evidence, the medical officer is expected to give opinion as to the time and date of death. This is because when there is no direct evidence, it is required to look to the medical evidence for necessary information regarding the time of death. In the present case, there is no convincing evidence on material part of prosecution case, the time of death.

12. In view of the nature of medical evidence from the present case, it was necessary to ascertain the approximate time when the dead body would have appeared on the surface of water. As the lady [p.w. 7] the only witness of "last seen" incident has given evidence that she had seen the deceased alive with the accused at about 10.30 to 11 a.m. on 5/6/99, it can be said that her evidence is in conflict with the general science that the minimum period of 24 hours is required for the appearance of the dead body on surface of the water. When there is conflict between the direct evidence or for that matter, circumstantial evidence on one hand and such opinion on the other the trial Court is expected to look into the oral evidence to ascertain as to whether it is convincing.

13. Let us now see the evidence of two witnesses who have given some evidence on the circumstance of "last seen". Aylubai [p.w. 7] has deposed that on that day, till 7.30 p.m. the deceased was in her company as the deceased was taken by her for a function/lunch. She has deposed that on that day, the accused and Vinayak, the husband of the accused were present in the field throughout the day. There is no specific evidence as to when food was lastly given to the child by [p.w. 7] or even by the accused. Necessary observation with regard to post mortem examination in this regard are already made, in view of these circumstances, it can be said that there is no circumstantial check to evidence of [p.w. 7] that she had seen the deceased in the company of accused at about 10.30 to 11 p.m.

14. Vinayak [p.w. 8] father of deceased has deposed that on that day, the accused was in his company throughout the day and she was working in the field. He had stated before police that Chaitanya was with them throughout the day. This portion of police statement is proved as contradiction in the evidence of investigating officer [p.w. 10] as Vinayak avoided to admit this portion of the statement. The contradiction at Exh. 26 needs to be treated as material

contradiction in view of the evidence given by P.W. 7. Neither P.W. 7 nor P.W. 8 have given evidence that on that day, there was some incident due to which the accused had become angry with them or with the child. On the contrary, the evidence of P.W. 7 shows that the accused was always taking proper care of the child and she had no grudge whatsoever against the child.

15. There is no evidence with prosecution to show that any other person had seen accused with the deceased on that night or on that day. The well in which the dead body was found is at a distance of 1 Km. from the village. The village road is situated at a distance of 15 ft. from the well. As no other person noticed the accused taking the child to any place on that day or on that night, it can be said that the prosecution wants to rely on the version of P.W. 7 and P.W. 8. Thus, there is no corroboration of independent evidence to the version of P.W. 7 and P.W. 8 and further there is conflict between their oral evidence and the expert opinion based on general science.

16. In the evidence of Bhaskar [P.W. 3] spot panchanama is proved as Exh. 13. This evidence shows that the well has no parapet wall. The water of the well was at a distance of 4 ft from ground level. There were bushes and creepers surrounding the well. The village road was at the distance of 15 ft from the well. The deceased was aged about 11/2 years. Due to the age of the deceased, it can be said that the deceased was either able to walk or atleast crawl and the deceased was in a position to move on its own. Thus, if the time of last seen given by P.W. 7 is ignored and the opinion based on science is accepted, it can be said that the death had taken place before early hours of 5/6/99 and not after 11 p.m. of 5/6/99. This possibility is in favour of the accused and so, it needs to be accepted. The evidence of spot panchanama creates another possibility like accidental fall of the child into the well. Such possibility is always there and it cannot be ignored when evidence on "last seen" incident is not convincing.

17. The evidence of Sharad [P.W. 9] shows that accused was noticed by him at about 3 p.m. on 7/6/99 in his field. She was found sleeping in the field and she did not respond to many calls given to her by many persons. He has deposed that they shifted the accused to village in a bullock cart at 6 p.m. on 7/6/99. Surprisingly, the accused was not seen by anybody from 10.30 p.m. of 5/6/99 to 3 p.m. of 7/6/99 as per evidence of prosecution. From the nature of evidence, it can be said that the accused was in severe shock. The investigating officer [P.W. 10] has deposed that the accused was formally arrested on 8/6/99. In the record, time of arrest is shown as 6.30 hrs. on 8/6/99. If the report was given at about 1 p.m. on 7/6/99, and if accused was traced at about 3 p.m., it was necessary for prosecution to explain as to why she was not taken in custody for more than 24 hours. The evidence of Manik [P.W. 2], brother of Vinayak shows that relatives of accused on parents side had come to their village and they had given report against husband and relatives of the husband due to this incident. All these circumstances create a probability that to save themselves, the husband and his relatives gave the report and they concocted the case against

her.

18. In view of the aforesaid circumstance, there is no need to discuss other defence taken by the accused and the explanation given by her about her absence. The evidence of prosecution is not free from doubt and there was the reason for the husband of accused to implicate her in the case. The conflict between the expert opinion based on science and the oral evidence has gone to the root of the case.

19. It is well settled law that for establishing the circumstance of "last seen" and for using Section 106 of Evidence Act, it is necessary to establish the proximity of the circumstance as to the time, the place and space. Though the accused was charge sheeted for offence u/s 302 of IPC, she is convicted for offence u/s 304-A of IPC. For proving this offence either rashness or negligence is required to be proved. For this offence also, the prosecution is required to prove that the act of rashness or negligence of the accused caused the death. In view of the aforesaid circumstance of this case, this Court holds that there is no evidence to prove the ingredients of offence punishable u/s 304-A of IPC also. Even for this offence, there has to be some circumstantial evidence on the basis of which inference can be drawn. The Court cannot make a case of its own. So, this Court holds that the conviction given by the trial Court for the offence punishable u/s 304-A of IPC also cannot sustain in law. In the result, the Appeal is allowed. The judgment and order of Sessions Court delivered in Sessions Case no. 82/99 convicting and sentencing the appellant-accused for offence punishable u/s 304-A of IPC is hereby set aside. The appellant stands acquitted of the offence punishable u/s 304-A of IPC also. The bail bonds stand cancelled. Fine amount if any deposited by the appellant is to be returned to her.