

(2017) 01 BOM CK 0107
In the Bombay High Court
Case No : Criminal Appeal No.126 of 2015

Mangesh s/o Gurudeo Jumnake

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 06-01-2017

Acts Referred:

Evidence Act, 1872 — Section 3, Section 8
Penal Code, 1860 (IPC) — Section 302

Citation : (2017) 1 AIRBomRCri 679 : (2017) ALLMRCri 724 : (2017) 1 BomCR(Cri) 655 : (2017) 1 MhLJCrI 558

Hon'ble Judges : B.R. Gavai and Kum. Indira Jain, JJ.

Bench : Division Bench

Advocate : Mr. R.M. Daga, Advocate, for the Appellant; Mr. S.J. Kadu, Additional Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

B.R. Gavai, J. (Oral) - Being aggrieved by the judgment and order passed by the learned Sessions Judge, Gadchiroli in Sessions Case No.136 of 2012 dated 27.02.2015 thereby convicting the appellant for the offence punishable under Section 302 of the Indian Penal Code and sentencing him to suffer imprisonment for life and to pay fine of Rs.1,000/- in default of payment of fine to suffer simple imprisonment for one month, the appellant has approached this Court.

2. The prosecution story as could be gathered from the material placed on record is thus :-

PW11 Devendra along with his mothers PW2 Kunta and PW5 Ratna were running a lodge viz. "Janseva Lodge" at Gadchiroli. On 25.06.2012 accused Mangesh along with deceased Kalpana had come to the lodge and resided in the said lodge. They were residing in room no.224. When the appellant and the deceased had come to the lodge for residing, an entry was taken in the register of the lodge in the handwriting of appellant by PW2 Kunta. After taking the entry in the register, keys of room no.224 were given to the accused and thereafter accused

and the deceased were occupying the said room.

3. On 27.06.2012 first informant PW11 Devendra saw the accused going out of the lodge. Hence he asked as to whether he is leaving the room. Accused told him that he will be returning back to the lodge as he was going out of the lodge for purchasing certain articles. Accused Mangesh also told PW11 that Kalpana was sleeping in the room. However, accused did not return to the lodge in that night. The complainant had noticed that room no.224 was locked from outside.

4. Since the accused/appellant did not return till 28.06.2012 and since the room no.224 was still locked from outside, the first informant got frightened and informed the same to Gadchiroli Police Station. Thereupon PSI PW14 Ingole went to the spot, broke open the lock and seen the dead body of Kalpana lying in the room. The dead body was lying in a pool of blood and the head of the body was severed. PW14 Sachin Ingole prepared spot panchanama in the presence of panch witnesses. A bag was lying on the bed of the room, entire room was stained with blood and pair of chappal was also seen there. The bag was containing mobile, charger and other articles. Accordingly on the basis of the oral report of PW11, first information report came to be lodged. The investigation was set motion. The dead body was sent for post mortem, which was conducted by PW13 Dr. Sujata Shambharkar. The accused was arrested on 30.06.2012.

5. On 3.7.2012 on the memorandum of the accused under Section 27 of the Indian Evidence Act, the clothes worn by him at the time of the incident and the knife used by him in the crime were recovered from the hidden place near Pal river on Armori road. After the conclusion of investigation, charge sheet came to be filed in the Court of the Chief Judicial Magistrate, Gadchiroli. Since the case was exclusively triable by the Sessions Court, same came to be committed to the learned Sessions Judge, Gadchiroli.

6. The charge was framed against the accused below Exh.3. He pleaded not guilty and claimed to be tried. At the conclusion of the trial, the learned trial Judge passed the order of conviction and sentenced the appellant as aforesaid. Being aggrieved thereby, the present appeal.

7. Mr. Daga, the learned counsel appearing on behalf of the appellant submits that the present case is based on circumstantial evidence. He submits that the prosecution has utterly failed to prove the incriminating circumstances. He further submits that the evidence of last seen is totally unreliable. He submits that according to the medical expert's evidence the death of the accused had occurred between a period of 24 to 36 hours prior to the post motem being conducted. He submits that even if the evidence of last seen theory is accepted, the appellant had already left the lodge. He submits that from the evidence of the witnesses on the last seen theory, it could be seen that one another person who had covered his face had also left the lodge and the possibility of the said person committing the crime cannot be ruled out. In this respect the learned counsel relies on the judgment of the Apex Court in the case of Kanhaiyalal v.

State of Rajasthan reported in (2014) 2 Supreme Court Cases (Cri) 413.

8. The learned counsel further submits that from the evidence of PW13 it would be clear that the signs of throttling were not noticed by her and as such the prosecution has failed to prove beyond reasonable doubt that the death was homicidal. The learned counsel has placed reliance on the judgment of the Division Bench of this Court in the case of Nitin Digamber Kothawade v. State of Maharashtra reported in 2015 (4) Mh.L.J. (Cri) 626. The learned counsel further relying on the judgment of the Apex Court in the case of Ramreddy Rajesh Khanna Reddy v. State of A.P. reported in (2006) 10 Supreme Court Cases 172, submits that merely because the accused and the deceased were last seen together, cannot be a ground to sustain the order of conviction. The learned counsel further relying on the judgment of the Division Bench of this Court in the case of Govinda Kashiram Wanare v. State of Maharashtra reported in 2015 (3) Mh.L.J. (Cri) 621 submits that mere conduct of the accused cannot be a ground to rest the order of conviction. On the basis of such an evidence, the conviction would not be sustainable.

9. Mr. Kadu, the learned Additional Public Prosecutor on the contrary submits that the prosecution has proved the circumstances regarding the accused and the deceased last seen together, the death of the deceased occurring immediately thereafter, the recovery of the blood stained clothes and the knife used in the crime on a memorandum of the accused under Section 27 of the Indian Evidence Act and the motive. He submits that these circumstances form such a chain of events which leads to no other conclusion than one of guilt of the accused. The learned APP further submits that once the prosecution has proved beyond reasonable doubt that the accused and the deceased were together and that the death of the deceased has occurred during the period, then the burden would shift upon the accused in view of the provisions of Section 106 of the Indian Evidence Act. The learned APP relied on the judgment of the Apex Court in the case of Trimukh Maroti Kirkan v. State of Maharashtra reported in (2006) 10 Supreme Court Cases 681. The learned APP also relies on the judgment of the Apex Court in the case of Rohtash Kumar v. State of Haryana reported in (2013) 14 Supreme Court Cases 434.

10. With the assistance of the learned counsel appearing for the appellant and the learned Additional Public Prosecutor, we have scrutinized the entire evidence on the record.

11. Insofar as the accused lastly seen in the company of the deceased is concerned, the prosecution relies on the evidence of three witnesses viz. PW11 Devendra Bise, PW2 Kunta Bisen and PW5 Ratna Bisen.

12. PW11 is the first informant. He has stated in his evidence that on 25.06.2012 he was present in the lodge. On that day at around 2 to 2.30 p.m., the accused and the deceased had come to lodge. They requested to give one room for residence for 2-3 days. He had given room no.224 of the lodge to them. His

mother PW2 Kunta was at the counter of the lodge. As per say of his mother, accused Mangesh had made entry in the register of the lodge. Thereafter he had taken them to room no.224. Accused Mangesh and Kalpana were going out of the lodge and again returning to the lodge. On 27.06.2012 at around 11 to 11.30 a.m. , the accused had gone out of the lodge. He told him that Kalpana is sleeping in the room and he is going out of the lodge for purchasing articles. At that time, he had worn a hat and he was having one bag with him. Thereafter he left the lodge. However, he did not return to the lodge in the night also. During that period, he had seen that the room was locked from outside.

13. He has further stated that since till 28.06.2012 Mangesh did not return to the lodge, he was frightened and thereafter along with his mother Kunta had gone to Gadchiroli Police Station. He informed the fact in the Police Station. Thereafter PSI Ingole along with other police persons had come to the lodge. They broke open the lock of room no.224. Thereafter when the door of the room was opened, they had seen the dead body of Kalpana lying in the room in a pool of blood. This witness has been thoroughly cross-examined. However, nothing damaging has come in his evidence. Not only that the version in his deposition is fully corroborated by the first information report.

14. PW2 Kunta Bisen is the mother of PW11 Devendra. Her version is also similar to the one given by PW11. She has stated in her evidence that when the accused and the deceased had come to the lodge, she was standing behind PW5 Ratna at the counter of the lodge. PW5 Ratna had inquired with Mangesh and also verified his identity card. The accused had made an entry in the register. The accused had deposited an amount of Rs.200/-. She has further stated that on 27.06.2012 at around 12.30 p.m. Mangesh had locked his room and was leaving the lodge. No doubt that there are certain omissions in her evidence. However, insofar as the evidence regarding the accused and the deceased coming to the lodge on 25.06.2012 and the accused leaving the lodge alone on 26.06.2012 have remained unchallenged.

15. Similar is the evidence of PW5 Ratna. Her version is also similar as that of PW2 Kunta. The only difference is that she had not seen the appellant leaving the lodge on 27.06.2012 but was informed about the same by PW2 Kunta. Merely because there are certain omissions in the evidence of these two witnesses, cannot be a ground to discard their testimony in to. It will be appropriate to refer to the following observations of Their Lordships of the Apex Court in the case of Rohtash Kumar (supra):

"24. It is a settled legal proposition that while appreciating the evidence of a witness, minor discrepancies on trivial matters which do not affect the core of the case of the prosecution, must not prompt the court to reject the evidence in its entirety. Therefore, unless irrelevant ,details which do not in any way corrode the credibility of a witness should be ignored. The court has to examine whether evidence read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence more

particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witnesses and whether the earlier evaluation of the evidence is shaken, as to render it unworthy of belief. Thus, the court is not supposed to give undue importance to omissions, contradictions and discrepancies which do not go to the heart of the matter, and shake the basic version of the prosecution witness. Thus, the court must read the evidence of a witness as a whole, and consider the case in light of the entirety of the circumstances, ignoring the minor discrepancies with respect to trivial matters, which do not affect the core of the case of the prosecution. The said discrepancies as mentioned above, should not be taken consideration, as they cannot form grounds for rejecting the evidence on record as a whole. (See: State of U.P. v. M.K. Anthony, AIR 1985 SC 48; State rep. by Inspector of Police v. Saravanan & Anr., AIR 2009 SC 152; and Vijay @ Chinee v. State of M.P., (2010) 8 SCC 191).

It could thus be seen that while appreciating the evidence of the witnesses, minor discrepancies on trivial matters which do not affect the core of the case of the prosecution, must not prompt the court to reject the evidence in its entirety. It has been held by Their Lordships that the Court is not supposed to give undue importance to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution witness.

16. If we peruse the evidence of all the three witnesses, it would be clear that the testimony of these three witnesses has gone unshaken insofar as the accused and the deceased coming to the lodge on the afternoon of 25.06.2012, the accused leaving the lodge alone on 27.06.2012, keeping the room no.224 locked from outside.

17. It is further to be noted that even the accused in his statement under Section 313 of the Code of Criminal Procedure also admits that he remained in the lodge with the deceased from 25.06.2012 to 27.06.2012 at around 11.30 a.m.

18. The next circumstance would be regarding the death of the deceased being homicidal and the approximate time of death of the deceased. The perusal of the evidence of PW13 Dr. Sujata and the post mortem report would reveal that the probable cause of death given is throttling. An attempt is made by the learned counsel for the appellant to argue that since the signs of throttling are not present, the prosecution has failed to prove that the death was homicidal. It will be relevant to refer to the following part of the deposition of PW13 :-

"I found following injuries on her person. (i) The body was cut two pieces. The head was separated from torso at the level of C5 & C6. There was opening of trachea, esophagus, cervical spine and major vessels at the base of head. Margins were not showing signs of inflammation.

(ii) Neck over torso shows decapitation with skin of neck shows linear contusions on both sides. The 2 contusions were present present over neck on either side of

size 3 x 0.7 c.m. and 4 c.m. x ? c.m. , bluish black in colour parallel to each other and 2 cm above medial aspect of clavicle. Haemorrhage in subcutaneous tissue and trap muscles underline the contusions were present and were showing the signs of inflammation.

(iii) The neck skin over decapitated head shows contusion of size 5 c.m. x 1.5 c.m. oval in shape bluish black in colour 3 c.m. below chin. Haemorrhage in subcutaneous tissue and muscles underline the contusions were present and were showing sign of inflammation.

The injury no.2 and 3 of column no.17 was ante mortem and injury no.1 was post mortem.

2. I found following internal injuries.

(i) under scalp haematoma is present in right frontal region, 3 cm above midsupra orbital ridge, 2 cm away from midline, reddish black in colour.

(ii) in throx soft tissue haemorrhage in an around trachea, larynx and strap muscle of neck are present with evidence of diffuse haematoma and over laryngeal apparatus, reddish black in colour."

It will also be relevant to refer to following part of her deposition :

"On 19.7.2012 the knife was sent to me along with forwarding letter for verification. Copy of forwarding letter Exh.46 now shown to me, is the same. It is bearing my signature as I had received the same. I had verified the weapon and issued certificate by giving letter to investigating officer. Letter now shown to me, is the same. It is in my handwriting and signed by me. It is at Exh.91. I had given following replies to the questions of investigating officer.

(i) deceased had not died due to decapitation.

(ii) the blade of knife has blood stains.

(iii) the injury no.1 of PM report is possible by that weapon.

(iv) the cause of death of deceased was throttling.

(v) the approximate time of death was between 24 to 36 hours before death."

19. The learned counsel heavily relies on the judgment of the Division Bench of this Court in the case of Nitin Kothawade (supra) in support of the said proposition. However, in the said case the question that fell for consideration before the Court was as to whether the death was homicidal or there was a possibility of the death being suicidal. As such the observation made therein by the Court are with regard to the said issue. However, in the present case it has been found by the medical expert that the injury nos. 2 and 3 referred by her were ante mortem, whereas the injury no.1 was post mortem. If we accept the contention of the learned counsel for the appellant, we will have to come to the conclusion that the deceased had first committed suicide by hanging and then

cut her body two pieces. We find that the contention as raised in this regard needs to be rejected.

20. As per the medical expert's evidence, the death has occurred between a period of 24 to 36 hours prior to conducting the post mortem. The post mortem is conducted at around 4.45 p.m. on 28.06.2012. As such the approximate time of death of the deceased was between 4.45 a.m. to 4.45 p.m. of 27.06.2012.

21. The next circumstance is with regard to recovery of the incriminating material. Perusal of the evidence of PW3 Anandrao Madavi who has acted as a panch would reveal that the appellant has given a statement in his presence that he had killed Kalpana and he was ready to produce the knife and his clothes concealed by him below Mali tree in polythene bag by the side of Armori road. No doubt that the part of the statement which is incriminating cannot be read evidence. However, the part of the statement which leads to recovery of the articles from a place exclusively within the knowledge of the appellant can be read evidence in view of the provisions of Section 27 of the Indian Evidence Act. The perusal of the evidence of PW3 would reveal that after recording the memorandum of the accused, he had led the police party and the panchas on a Armori road and after crossing a distance of around 500 meters from the Pal river, taken them to a distance of around 50 meters from the Tar road and shown the articles which were concealed in a polythene bag under the bushes below the Mali tree. The panchanama shows that the said polythene bag contained a blue colour pant, a biscuit colour T-Shirt and a knife having length of 19 cm and the width of 5 cm. It could thus be seen that though the recovery was from an open place, it was from a place exclusively within the knowledge of the appellant. The articles were seized from a place where the accused had hidden them underneath the bushes at a place far away from the main road. In our view, in view of the judgment of the Apex Court in the case Yakub Abdul Razak Memon v. State of Maharashtra Menon reported in (2013) 13 Supreme Court Cases 1, the said recovery of the incriminating material would be a circumstance proved by the prosecution against the accused. We may gainfully refer to the following observations of the Apex Court in the said case :

"1708. In view of the above, it cannot be accepted that a recovery made from an open space or a public or a public place which was accessible to everyone, should not be taken consideration for any reason. The reasoning behind it, is that, it will be the accused alone who will be having knowledge of the place, where a thing is hidden. The other persons who had access to the place would not be aware of the fact that an accused, after the commission of an offence, had concealed contraband material beneath the earth, or in the garbage."

22. The Chemical Analyser's report would reveal that the Article Nos. 11 and 12 which are the full pant and the T-Shirt recovered at the instance of the accused on a memorandum under Section 27 of the Indian Evidence Act are having the blood group A and B, which is also the blood group of the deceased. It could further be seen that the blood which is found on the knife recovered at the

instance of the accused is also having human blood. We, therefore, find that the said circumstance is also an incriminating circumstance.

23. It could thus be seen that the prosecution has proved following circumstances beyond reasonable doubt :

(i) that the deceased and the appellant had checked in at Janseva Lodge on the afternoon of 25.06.2012;

(ii) that they were living together in the said lodge, going out and again coming back;

(iii) that the appellant had left the lodge at around 12 noon on 27.06.2012;

(iv) that while leaving the lodge, the accused had informed PW11 that he was going to purchase articles and that the deceased was in the room;

(v) that the room was locked from outside;

(vi) that since the accused did not return till the morning of 28.06.2012, PW11 informed the Police Station Gadchiroli;

(vii) that the Police Officer of the Gadchiroli Police Station opened the room and found the dead body of Kalpana;

(viii) that from the evidence of PW13 and the post mortem report, it is proved that the death of the deceased is homicidal;

(ix) that the timing of the death of the deceased is between 4.45 a.m. to 4.45 p.m. of 27.06.2012;

(x) that the clothes and the weapon used in the crime were recovered from a place where they were concealed and which was exclusively within the knowledge of the accused, on a memorandum under Section 27 of the Indian Evidence Act;

(xi) that the clothes of the accused are found stained with the blood having group of A and B which is the blood group of the deceased.

24. The legal position in a case based on a circumstantial evidence is very well crystallized by the Apex Court in the case of Sharad Birdhichand Sarda v. State of Maharashtra reported in (1984) 4 Supreme Court Cases 116—

"153. 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 & Anr. v. State of Maharashtra* ("1973) 2 SCC 793-para 19) where the following 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.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

25. It could thus be seen that Their Lordships have in unequivocal terms held that the facts so established should be consistent only with the hypothesis of the guilt of the accused. It has been held that the chain of circumstances should be so complete so as to lead to no other conclusion than the guilt of the accused. We have discussed herein above the circumstances which are established beyond reasonable doubt against the appellant. We are of the considered view that the chain of circumstances is so interlinked to each other which leads to no other conclusion than the guilt of the accused.

26. We may gainfully refer to the following observations of the Apex Court in the case of *Trimukh Maroti Kirkan* (supra) :

"15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."

27. In the present case it could be seen that even the appellant himself has admitted in his statement under Section 313 of the Code of Criminal Procedure that he was with the deceased till the afternoon of 27.06.2012. However, he has stated that when he left the lodge, the deceased was in the room. He further states that when he left the room was not locked and when he returned back at 12.30 noon the room was locked. He further states that he made inquiry about Kalpana with persons of Lodge. They did not give any information to him and, therefore, he had gone to village Wakdi. However, this version of the accused is falsified by the evidence of PW11 Devendra, PW2 Kunta and PW5 Ratna. In any case in view of Section 8 of the Indian Evidence Act, the conduct of the appellant will also have to be taken consideration. Had the accused really returned and did not find the deceased and found the room locked, a person would have immediately informed the Police. We are, therefore, of the considered view that the explanation given by the accused is a false explanation. We are aware about the legal position that false explanation cannot be a circumstance to complete the chain. However, the same can be used to fortify the conclusion of the guilt arrived on the basis of other circumstance. We may gainfully refer to the following observations of the Apex Court in the case of Sharad Birdhichand Sarda (supra) :

"151. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this : where various links in a chain are in themselves complete than a false plea or a false defence may be called aid only to lend assurance to the Court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court."

28. We may also gainfully refer to the following observations of the Apex Court in the case of Trimukh Maroti Kirkan (supra) :

"21. In a case based on circumstantial evidence where no eye-witness account is available, there is another principle of law which must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. This view has been taken in a catena of decisions of this Court. [See State of Tamil Nadu v. Rajendran (1999) 8 SCC 679 (para 6); State of U.P. v. Dr. Ravindra Prakash Mittal AIR 1992 SC 2045 (para 40); State of Maharashtra v. Suresh (2000) 1 SCC 471 (para 27); Ganesh Lal v. State of Rajasthan (2002) 1 SCC 731 (para 15) and Gulab Chand v. State of M.P. (1995) 3 SCC 574 (para 4)]."

29. In that view of the matter, we are of the considered view that the prosecution has proved beyond reasonable doubt that it is the accused and the

accused alone who is author of the crime. The appeal is, therefore, without merit and as such dismissed.