
(1999) 11 BOM CK 0015
In the Bombay High Court
Case No : Criminal Appeal No. 5 of 1999

Mr. Franco D'Souza

APPELLANT

Vs

State of Goa

RESPONDENT

Date of Decision : 16-11-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 165, 235
Evidence Act, 1872 — Section 27, 45, 61, 9
Penal Code, 1860 (IPC) — Section 201, 27, 302, 304

Citation : (2000) 5 BomCR 890 : (2000) CriLJ 1985 : (2000) 4 MhLj 91 : (2000) 4 MhLj 9

Hon'ble Judges : R.M.S. Khandeparkar, J; R.K. Batta, J

Bench : Division Bench

Advocate : S.D. Lotlikar, for the Appellant; A.P. Lawande, Public Prosecutor, for the Respondent

Judgement

R.K. Batta, J.—The appellant was tried for murder of his sister, Clementina Fernandes u/s 302 of the Indian Penal Code and also for causing disappearance of evidence of the offence u/s 201 of the Indian Penal Code. The appellant pleaded not guilty to the charge. The prosecution examined nine witnesses in support of the charge. After assessment of the evidence, learned Additional Sessions Judge by the impugned judgment, which is the subject matter of challenge in this appeal, found the appellant guilty u/s 304 (Part II) and 201 of the Indian Penal Code. The appellant was sentenced to undergo seven years rigorous imprisonment and to pay a fine of Rs. 1000/- and in default to undergo another six months simple imprisonment u/s 304 (Part II) of the Indian Penal Code and was further sentenced to undergo one year rigorous imprisonment and to pay fine of Rs. 500/- and in default to undergo another two months simple imprisonment u/s 201 of the Indian Penal Code. The sentences were ordered to run concurrently. The period of detention during the trial from 18-5-1997 was set off in terms of section 428 of the Criminal Procedure Code.

2. The prosecution case, in brief, is that the appellant, his sister Clementina

Fernandes and Sydney Fernandes P.W. 6, son of the deceased Clementina Fernandes were staying together. The husband of the deceased Clementina Fernandes was abroad. On 17-5-1997 at about 3-30 a.m. Sydney Fernandes P.W. 6 got up after hearing that something had hit on his mother. On getting up he saw that his mother was bleeding from her head. He also saw that the appellant had caught hold of the neck of his mother. He also found by the side of his mother a wooden rafter, at one end of which, there was blood and the other end was wrapped with newspaper and the banian of the appellant. The appellant told Sydney P.W. 6 not to shout, otherwise he would assault him. Sydney P.W. 6 saw that the appellant kept the rafter in the kitchen under the firewood. Sydney P.W. 6 also saw that there was blood on the pillow. The appellant called Maria Santan Essaki P.W. 1 who is related to him immediately after the incident. The appellant did not inform her as to what exactly had happened, he only asked her to come. When she came at that time the appellant told her that he had assaulted Clementina by a danda. The police recovered the danda at the instance of the appellant u/s 27 of the Indian Penal Code (sic Evidence Act). Besides this, the police also recovered the ashes of the pillow on which Sydney P.W. 6 had seen the blood.

3. The defence case on the other hand, is that the deceased had fallen on the ground and that the appellant had not assaulted her.

4. Learned Advocate Shri Lotlikar appearing on behalf of the appellant has submitted before us that the F.I.R. in question had not only been manipulated but antedated and as such the same cannot be looked into. It is contended that in any event Sydney cannot be considered as an eye witness since he had not seen the actual assault and it is too much to expect from a child of twelve or thirteen years that he would wake up at 3.00 a.m. on hearing some noise and witness all what is stated by him. According to the learned Advocate for the appellant, the witness Sydney P.W. 6 seems to have imagined many facts which do not correspond to the reality in as much as that he saw blood on the danda but no blood was found on the danda by the Investigation Officer. According to the learned Advocate for the appellant, the prosecution has not established the charges against the appellant beyond doubt and he is entitled to acquittal. Alternatively, it is urged that the sentence in the facts and circumstances of the case is too harsh and the same requires to be substantially reduced.

5. On the other hand, learned Public Prosecutor, Shri Lawande has submitted that inspite of any lapse on the part of the Investigating Officer, the prosecution with the help of the evidence of Sydney P.W. 6, which is supported by the extra judicial confession before Maria P.W. 1 and the recovery of the danda as well as the recovery of the ashes of the pillow on which blood was seen by Sydney P.W. .1, has clinchingly established the guilt of the appellant and that there is no reason whatsoever to interfere with the findings of the trial Court. On the question of lapse by the Investigating Officer, reliance has been placed by him on decision in Somappa Vamanappa Madar and Shankarappa Ravanappa Kaddi Vs.

State of Mysore, , Karnel Singh Vs. State of M.P., and Ram Bihari Yadav Vs. State of Bihar and Others, . On the question of reduction of sentence, it is urged by him that he would leave the matter to the discretion of the Court.

6. We have examined the records in the light of the submissions advanced by the learned Advocate for the appellant and the learned Public Prosecutor on behalf of the State. The prosecution evidence consists of :

- (i) Evidence of Sydney Fernandes, P.W. 6
- (ii) Extra judicial confession by the appellant.
- (iii) Evidence of Maria Santan Essaki, P.W. 1.
- (iv) Recovery of the danda u/s 27 of the Evidence Act.
- (v) Recovery of ashes of the pillow.
- (vi) Motive.

7. The motive is stated to be that the deceased was roaming with others which was not liked by the appellant. In fact the evidence of the Doctor P.W. 2 on record proves that on the night of the incident, the deceased is said to have intercourse with somebody as spermatozoa were found in the vaginal smears. Admittedly the husband of the deceased was abroad. The conduct of the deceased was not liked by the appellant who is her brother which seems to have been enraged the accused to commit the crime in question.

8. The evidence of Sydney Fernandes P.W. 6 is clinching and establishes beyond doubt the involvement of the appellant in the crime in question. Sydney P.W. 6 has stated that he got up at about 3.30 a.m. after hearing that something had hit his mother and found that she was bleeding from her head. The appellant had caught hold of the neck of his mother and he threatened him that if he shouted he would assault him. The fact that the appellant had caught hold of the neck of his mother and threatened to assault Sydney P.W. 6 if he shouted has not been denied. Besides this, Sydney found a wooden rafter by the side of his mother. There was blood on one end of the rafter and the other end was wrapped with newspaper and the banian of the appellant. This rafter was kept in the kitchen under the firewood which was recovered at the instance of the appellant u/s 27 of the Indian Penal Code (sic Evidence Act). Besides Sydney P.W. 6 has stated that he had seen blood on the pillow on which his mother was sleeping. The ashes of this pillow were recovered at the instance of the appellant from behind the house. This evidence clinches beyond doubt the involvement of the accused and the guilt of the accused.

9. In addition, there is extra judicial confession made by the appellant to Maria Essaki P.W. 1 who was admittedly called by the appellant to his house immediately after this incident. The appellant had rang her up and told her to come without disclosing as to what had happened. When she came to the house the appellant told him that he had assaulted Clementina by a danda. No motive

has been attributed either to Maria P.W. 1 or Sydney P.W. 6 as to why they should depose against the appellant nor it is suggested that they were having some enenical relations with the appellant.

10. The story put forward by the appellant that the deceased had fallen near the toilet has been overruled by the medical evidence and also the evidence of P.W. 1 to whom the appellant never informed that the deceased had fallen near the toilet, but on the contrary the appellant had told her that he had assaulted the deceased with a danda. The medical evidence has also ruled out the theory of injuries being the result of fall on any projecting part of the floor or violent impact on a projection of the wall like the tap of a sink.

11. The evidence on record, in our opinion is sufficient to establish involvement of the appellant in the crime. The learned Additional Sessions Judge after appreciating all the evidence on record has found the appellant guilty under sections 304 (Part II) and 201 of the Indian Penal Code. On merits, we do not find that there is any case for interference.

12. The lapse in the investigation if any, would not affect the prosecution case as has been pointed out by series of judgments of the Apex Court, if the evidence on record can be otherwise relied upon. The Apex Court in *Somappa Vamanappa Madar and Shankarappa Ravanappa Kaddi Vs. State of Mysore*, had held that even rejection of F.I.R. would not detract the testimony of eye-witnesses which will have to be assessed on its own merits. The attack in the case before us is to the F.I.R. in antedating the same. The F.I.R. is lodged by Maria Essaki P.W. 1 who has not seen the incident. We have already come to the conclusion that evidence of P.W. 1 relating to extra judicial confession made by the appellant is trustworthy. We also find that the evidence of Sydney P.W. 6 is trustworthy and can be relied upon.

13. The Apex Court in the matter of *Karnel Singh Vs. State of M.P.*, was dealing with a case wherein the investigation was defective and after expressing unhappiness, it was pointed out that the evidence on record, which requires strict scrutiny, has to be looked into in order to find out if such evidence establishes the guilt of the accused. It was further pointed out that in cases of defective investigation, the Court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the Investigating Officer if the investigation is designedly defective.

14. The Apex Court in *State of Karnataka v. K. Yarappa Reddy*, reported in 1999(8) SC 496 has laid down that criminal justice should not be made the casualty for the wrongs committed by the Investigating Officers in the case. If the Court is convinced that the testimony of a witness to the occurrence is true, the Court is free to act on it albeit Investigating Officer's suspicious role in the case.

15. In *Ram Bihari Yadav Vs. State of Bihar and Others*, also the Apex Court has

observed that in cases of defective investigation, the story of the prosecution will have to be examined de hors such omissions and contaminated conduct of the officials, otherwise the mischief which was deliberately done would be perpetuated and justice would be denied to the complainant party and this would obviously shake the confidence of the people not merely in the law enforcing agency but also in the administration of justice.

16. We therefore, hold that the conviction of the appellant under sections 304 (Part II) and 201 of the Indian Penal Code does not at all require any interference. Nevertheless, in so far as the sentence is concerned, we are of the opinion that the sentence in respect of the offence u/s 304 (Part II) is on the higher side in the facts and circumstances of the case wherein the appellant was prompted to commit the crime on account of the fact that the deceased was moving with other persons while her husband was abroad. Taking into consideration the circumstances, we are inclined to reduce the sentence u/s 304 (Part-II) from seven years to five years rigorous imprisonment. But for this modification, the appeal is dismissed.

17. Appeal dismissed.