
(2010) 04 BOM CK 0176
In the Bombay High Court
Case No : Criminal Appeal No. 837 of 2003

Ms. Leena Balkrishna Nair, Yerawada Central Prison	APPELLANT
Vs	
The State of Maharashtra	RESPONDENT

Date of Decision : 13-04-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 335, 335(1), 335(4), 338
Evidence Act, 1872 — Section 105
Lunacy Act, 1912 — Section 5
Penal Code, 1860 (IPC) — Section 299, 302, 84
Prisoners Act, 1900 — Section 30(1), 30(2)

Citation : (2010) 112 BOMLR 1614 : (2010) CriLJ 3392 : (2010) 5
RCR(Criminal) 274

Hon'ble Judges : V.K. Tahilramani, J;Ranjana Desai, J

Bench : Division Bench

Advocate : Latika Newarekar, for the Appellant; H.J. Dedhia, Assistant Public
Prosecutor, for the Respondent

Judgement

Ranjana Desai, J.—The appellant was tried by the Court of Sessions for Greater Bombay in Sessions Case No. 971 of 2000 for offence punishable u/s 302 of the Indian Penal Code (for short, "the IPC"). By impugned judgment and order dated 5/7/2002, the appellant was convicted for offence punishable u/s 302 and sentenced to suffer imprisonment for life and to pay a fine of Rs. 300/-, in default, to suffer rigorous imprisonment for one month. Being aggrieved by the said judgment and order, the appellant has preferred the present appeal.

2. It is necessary to give the gist of the facts. The appellant was residing at Room No. 172, Plot No. 5, Nagababa Nagar, Vashinaka, Chembur along with her aunt DW-1 Ramani Subhash Gaikwad, deceased Aparna and PW-1 Radhakrishnan Balkrishnan, who is the brother of the appellant. According to PW-1 Radhakrishnan, on 29/3/2002, while he was in the grocery shop of Bhimrao Kamble at about 7.00 p.m., his neighbour Sunita Chavan came to the shop and informed him that she heard a sound of throwing of stone from his room. He

went to his room and knocked the door for 2-3 times. Since nobody gave any response, he pushed open the door of the room. He noticed the deceased, the daughter of his aunt DW-1 Ramani, lying in a pool of blood inside the room. He noticed that the appellant was sitting on the cot. Nobody else was present there.

3. PW-8 PSI Chandrakant Patil, the Investigating Officer, who was attached to RCF Police Station, has stated in his evidence that he received telephone message at about 5.45 p.m. that one minor girl was murdered at Nagababa Nagar, Vashinaka, Chembur. On receipt of this information, he, PW-9 PI Vijay Meru and his staff reached the scene of offence. He found the dead body of minor girl lying in Room No. 172. Statement of PW-1 Radhakrishnan came to be recorded. It was treated as FIR (Ex-8). On the basis of the said FIR, investigation was started. PW-7 ASI Vithoba Jadhav, who had received a wireless message on 20/3/2000 at about 5.30 p.m. reached the scene of offence. He took over the custody of the appellant, who was present there. After completion of investigation, the appellant came to be charged as aforesaid.

4. The defence of the appellant was one of total denial. The appellant denied the prosecution case and set up the case of insanity. In support of her case, the appellant examined DW-1 Ramani Gaikwad. Learned Sessions Judge accepted the prosecution version. He came to a conclusion that the prosecution had proved its case beyond reasonable doubt. He also came to the conclusion that the appellant had not been able to probabalise her evidence that she was of unsound mind at the time of commission of offence. In the circumstances, he convicted the appellant as above and, hence, this appeal.

5. We have heard Ms. Newarekar, learned Counsel appearing for the appellant and Mr. Dedhia, learned A.P.P. appearing for the State. With the assistance of learned Counsel, we have gone through the record of the case.

6. Learned Counsel for the appellant submitted that learned Sessions Judge fell into a grave error in convicting the appellant. Learned Counsel submitted that the evidence on record, particularly the evidence of DW-1 Ramani, completely establishes the defence of insanity and, therefore, in view of Section 84 of the IPC, the appellant ought to have been acquitted. Learned A.P.P. on the other hand, submitted that no interference is necessary with the impugned order.

7. There can be no dispute that the death of Aparna was homicidal. PW-6 Dr. Vithal Vihurkar did the postmortem on the deceased. He has proved the postmortem notes (Ex-17). The postmortem notes indicate that the deceased had inter alia suffered fracture of skull. The cause of death is stated in the postmortem notes as "Head injury and Brain Hemorrhage". We have already given the gist of the evidence of PW-1 Radhakrishnan. His deposition makes it evident that on 29/3/2000 body of the deceased was found lying in his room situated at Nagababa Nagar, Vashinaka, Chembur, in an injured condition in a pool of blood. His evidence also establishes that the appellant was sitting on the cot in the room and nobody else was present inside the room. In his cross-

examination, the defence has not been able to dislodge the above version. PW-2 Chhaya Hamidani is the pancha to the scene of offence panchanama (Ex-10). She has proved the said panchanama. The panchanama indicates that there was one blood stained grinding stone lying by the side of the deceased. PW-3 is Sunita Chavan. She is a neighbour of PW-1 Radhakrishnan. According to her, on 29/3/2000, at about 6.30 p.m., she heard a sound of throwing of a stone from the room of the appellant. PW-1 Radhakrishnan came there. The door of his room was opened. According to this witness, the deceased was lying in a pool of blood on the ground and the appellant was sitting on a cot near her. PW-4 is Gangubai, another neighbour of PW-1 Radhakrishnan. She has given similar evidence. No dent is made in her cross-examination by the defence. PW-7 ASI Vithoba Jadhav and PW-9 PI Vijay Meru have given the details of investigation. A careful consideration of the evidence led by the prosecution clearly establishes that the appellant threw the stone on the deceased and killed her.

8. In support of her defence, the appellant has examined DW-1 Ramani, her aunt. DW-1 Ramani has stated that the deceased was her daughter. She had suffered a serious leg injury. She was unable to walk and, therefore, she had stopped attending the school. DW-1 Ramani has further stated that six months prior to March, 2000, the appellant had a feeling that somebody comes and assaults her. She was inclined towards committing suicide. Few days prior to March, 2000, she had run away from the house. DW-1 Ramani had shown the appellant to a local doctor. The local doctor had advised her to consult a specialist but she had no money for such consultation. DW-1 Ramani has further stated that sometimes the appellant used to respond properly. She used to sit by keeping her hands over her ears for long time. At such moment, she never used to talk to anybody and she never used to answer anyone's questions.

9. The evidence of the defence witness reflects the appellant's plea of insanity. Learned Sessions Judge has rejected the plea of insanity. He has observed that the defence has failed to prove that on the date of incident, the appellant was suffering from insanity and, therefore, the benefit of Section 84 of the IPC cannot be given to her. Learned Judge has observed that PW-1 Radhakrishnan, the brother of the appellant has also not given evidence of ill-health of the appellant and the evidence of DW-1 Ramani is not sufficient to prove that the appellant was suffering from unsoundness of mind.

10. Since we have come to a conclusion that the evidence establishes that the appellant killed the deceased, we now need to only examine whether the benefit of Section 84 of the IPC can be given to the appellant. The question is whether she has proved the defence of insanity and learned Judge has erred in rejecting it.

11. Section 84 of the IPC falls in Chapter IV of the IPC which contains General Exceptions. It excepts certain acts done by certain persons under certain set of circumstances from the penal provisions. Section 84 reads as under:

84. Act of a person of unsound mind. - Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

12. Section 299 of the IPC defines culpable homicide. It reads thus:

299. Culpable homicide. -

Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

13. Section 299 of the IPC states that for an act to be culpable homicide, there has to be an intention of causing death or the act should be accompanied by an intention of causing such bodily injury as is likely to cause death, or it should be done with the knowledge that such act is likely to cause death. As per Section 84 of the IPC, if it is established that by reason of unsoundness of mind, the accused is incapable of knowing the nature of the act committed by him which is an offence, it cannot be termed as an offence qua him. Underlying principle of this section is that the act contemplated therein lacks basic ingredient of an offence which is mens rea or criminal intention.

14. The burden of proving the existence of circumstances bringing the case within the purview of Section 84 of the IPC lies upon the accused u/s 105 of the Indian Evidence Act. Illustration (a) to Section 105 of the Evidence Act reads as under:

(a) A, accused of murder alleges that, by reason of unsoundness of mind, he did not know the nature of the act,

The burden of proof is on A.

Thus the burden of proving insanity at the time when the offence was committed lies on the accused who pleads the defence of insanity.

15. In *Dahyabhai Chhaganbhai Thakker Vs. State of Gujarat*, the Supreme Court considered the relevant aspects of the law of the plea of insanity. The Supreme Court observed that it is the fundamental principle of criminal jurisprudence that an accused is presumed to be innocent and, therefore, the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. The prosecution has to prove beyond reasonable doubt that the accused caused death with the requisite intention of causing death described in Section 299 of the IPC. This general burden never shifts and it always rests on the prosecution. The Supreme Court further observed that as per Section 105 of the Evidence Act, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the IPC or within any special exception or proviso contained in any other part of the same Code, or in any law defining the

offence, is upon the accused. The Supreme Court further observed that the accused will have to rebut the presumption that such circumstances did not exist, by placing material before the court sufficient to make it consider the existence of the said circumstances so probable that a prudent man would act upon them. The Supreme Court further observed that if the evidence so placed may not be sufficient to discharge the burden u/s 105 of the Evidence Act, but it may raise a reasonable doubt in the mind of a judge as regards one or other of the necessary ingredients of the offence itself and if the judge has such reasonable doubt, he has to acquit the accused. The relevant paragraph of the judgment of the Supreme Court may be quoted:

(7) The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions: (1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea; and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. (2) There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by S.84 of the Indian Penal Code: the accused may rebut it by placing before the court all the relevant evidence " oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings. (3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the court by the accused or by the prosecution may raise a reasonable doubt in the mind of the court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged.

In the same judgment, the Supreme Court has held that whether the accused was in such a state of mind as to be entitled to the benefit of Section 84 of the IPC can only be established from the circumstances which preceded, attended and followed the crime.

16. As directed by us, learned A.P.P. has tendered the medical record of the appellant in this Court. The case papers of the Thane Mental Hospital indicate that the appellant was under treatment for mental illness or insanity. It is noted in the medical papers that her behaviour was abnormal; she gets excited and engages herself in irrelevant talk. It is stated that she has auditory hallucinations and has suspicion about neighbours. There is also Reception Order dated 19/5/2000 passed u/s 5 of the Indian Lunacy Act IV of 1912, by the Additional Chief Metropolitan Magistrate, 11th Court, Kurla, Mumbai, which reads thus:

RECEPTION ORDER

Under Section 5 of the Indian Lunacy Act IV of 1912)

I, the under-signed Shri D.R. Bhosale, Addl. Chief Metropolitan Magistrate, 11th Court, Kurla, Mumbai, upon reading report submitted by the Superintendent,

Mumbai Central Prison, Mumbai, supported by medical opinions and the behaviour and conduct of the accused/mentally sick was also observed by the Judicial Officer, whenever she was produced for the purpose of the remand. The report appears to be well founded. Therefore, it is accepted/allowed. The Jail Authority is hereby permitted to lodge the accused/mentally sick in Thane Mental Hospital for treatment.

Sd/- D.R. Bhosale, Addl. Chief Metropolitan Magistrate 11th Court, Kurla, Mumbai.
Mumbai, 19.5.2000.

17. It is pursuant to this order, that the appellant was transferred to Thane Mental Hospital for treatment. It appears that learned Sessions Judge had sought opinion from the Superintendent of Institute of Mental Health, Thane as to whether the appellant is fit for discharge and trial and, on 19/9/2000, a certificate was issued by the Superintendent stating that she was fit for discharge and trial. The question is whether on the basis of this certificate, we could come to a conclusion that when the appellant committed the offence, she was mentally fit and, could know the consequences of her action. The question further is whether we can conclude that she had intention to murder the deceased.

18. We are unable to hold that the appellant had intention to murder the deceased. Her brother PW-1 Radhakrishnan has stated that after the incident in question, when he entered the room, he found the deceased lying in a pool of blood and the appellant was sitting on the cot. He has further stated that she was murmuring. The fact that after committing the offence, the appellant continued to sit and murmur is an indication that all was not well with her mental condition. The normal reaction of any accused in his senses would be to run away. It is true as held by the Supreme Court in Sheralli Wali Mohammed Vs. The State of Maharashtra, that mere fact that the motive has not been proved or that the accused made no attempt to run away would not by itself indicate that the accused was insane. But that would be one of the telltale circumstances which would go to establish insanity. In the cross-examination, PW-1 Radhakrishnan has stated that the appellant used to talk to herself even prior to the incident; she used to eat less, she used to remain sick and she was being treated in the Shatabdi Hospital six to seven months prior to the incident.

19. DW-1 Ramani, the aunt of the appellant and the mother of the deceased has stated that the appellant used to feel that somebody would come and assault her and, she was inclined towards committing suicide. She has further stated that a few days prior to March, 2000, she had run away from the house. According to her, she had shown the appellant to the local doctor and he had advised her to contact a specialist for treatment of the appellant. DW-1 Ramani has also stated that the appellant did not respond properly and, at times, she used to sit by keeping her hands over her ears for long time and at that time, she never used to talk to anybody and never used to answer any question. The fact that the mother of the deceased has gone on record to say that the appellant was ill and

was getting hallucinations is important and is a pointer to the appellant's insanity. It must be remembered that the appellant had killed her daughter. Unless, it is true, DW-1 Ramani would never have deposed about the mental condition of the appellant suggestive of unsoundness of mind. It is pertinent to note that the incident in question took place on 29/3/2000 and the reception order was passed by the Additional Chief Metropolitan Magistrate on 19/5/2000 within 50 days from the date of incident. Certificate issued by the Superintendent of Institute of Mental Health dated 19/9/2000 to the effect that she was fit for trial may be the result of the treatment given to her in the Thane Mental Hospital. But from that certificate, it cannot be concluded that the appellant was not insane when she committed the crime. From the evidence of PW-1 Radhakrishnan and DW-1 Ramani, we have no hesitation in further concluding that on the date of incident, the appellant was mentally unsound. Her behaviour establishes this fact beyond doubt. The prosecution has established circumstances which preceded, attended and followed the crime. It must be remembered that the accused does not have to conclusively prove the defence of insanity. If the evidence adduced by the prosecution and by the defence raises a reasonable doubt in the mind of the court that the accused might have been insane when she committed the offence, the accused is entitled to the benefit of Section 84 of the IPC. We feel that learned Judge overlooked vital evidence. He wrongly convicted the appellant. The appellant will have to be therefore acquitted.

20. On 1/4/2010, during the hearing of this appeal, we were informed by learned Counsel for the appellant that the appellant is kept in Yerwada Jail Hospital, but the Yerwada Jail Hospital has made a proposal to the Government that considering the type of mental illness from which the appellant is suffering, she should be shifted to the Mental Hospital Yerwada for further management. On that proposal dated 30/3/2010, the State Government had not taken any action. We noted our unhappiness over the State Government's lethargy and directed that the appellant be shifted to the Regional Mental Hospital, Yerwada and proper treatment be given to her. We are informed that accordingly, the appellant was shifted to the hospital and she is being given treatment in that hospital.

21. Today, we have been shown G.R. dated 8/4/2010 whereby the appellant is transferred from Yerwada Central Prison, Pune to Regional Mental Hospital, Yerwada, Pune. The G.R. is accompanied by a warrant issued u/s 30(1) of the Prisoners Act, 1900 for removal of the appellant to the Regional Mental Hospital. The warrant states that the State Government has ordered that the appellant shall be kept under medical care and treatment in the said hospital for the remainder of the term for which she has been sentenced to be imprisoned and if she recovers before expiration of the term, she should be remanded to prison u/s 30(2) of the Prisoners Act, 1900. This G.R. and the warrant proceed on the assumption that the conviction of the appellant is confirmed. As we have indicated hereinabove, the appellant deserves to be acquitted. The G.R. dated 8/4/2010 and the accompanying warrant therefore, need to be revoked.

22. The question is after acquittal where should the appellant be directed to be kept. Section 335 of the Code of Criminal Procedure 1973 (for short, "the Code") makes provision for detention of persons acquitted on the ground of unsoundness of mind. It reads thus:

335. Person acquitted on such ground to be detained in safe custody. - Whenever the finding states that the accused person committed the act alleged, the Magistrate or Court before whom or which the trial has been held, shall, if such act would, but for the incapacity found, have constituted an offence, -

(a) order such person to be detained in safe custody in such place and manner as the Magistrate or Court thinks fit; or

(b) order such person to be delivered to any relative or friend of such person.

(2) No order for the detention of the accused in a lunatic asylum shall be made under clause (a) of Sub-section (1) otherwise than in accordance with such rules as the State Government may have made under the Indian Lunacy Act, 1912 (4 of 1912).

(3) No order for the delivery of the accused to a relative or friend shall be made under Clause (b) of Sub-section (1), except upon the application of such relative or friend and on his giving security to the satisfaction of the Magistrate or Court that the person delivered shall -

(a) be properly taken care of and prevented from doing injury to himself or to any other person;

(b) be produced for the inspection of such officer, and at such times and places, as the State Government may direct.

(4) The Magistrate or Court shall report to the State Government the action taken under Sub-section (1).

23. It is apparent from the above provision that if a person, who has committed an offence is acquitted because when he committed the offence, he was of unsound mind, care must be taken to see that he is detained in safe custody because if such person is let loose in the Society, there is a possibility that he or she may commit similar offences. Sub-section (b) of Section 335 states that after acquittal, such person can be delivered to any relative or friend of such person. The appellant comes from poor strata of the society. The appellant's brother and aunt could not even give her proper treatment. In such situation, it is not possible for us to handover her to them. No friend has come forward to take her custody. For the time being, for better treatment, we have directed that she be kept in Regional Mental Hospital, Yerwada.

24. Section 338 lays down the procedure to be followed where lunatics are declared fit to be released. The State Government has a great role to play. It would be, therefore, necessary for the prison authorities to get the appellant examined by a competent psychiatrist. Her current physical and mental state

must be ascertained. The doctor must give his opinion as to whether the appellant is fit to be released from custody or whether she needs to be kept in safe custody because she needs further treatment. We, therefore, direct that the appellant be got medically examined by a competent psychiatrist and on the basis of the medical certificate issued by the doctor, the State of Maharashtra shall take steps as laid down in Section 338 of the Code. Such a course is followed by this Court in Nivrutti Dhondiba Shinde v. State of Maharashtra 1985 Cri.L.J. 449. Hence, we pass the following order:

O R D E R

25. The impugned judgment and order dated 5/7/2002 is quashed and set aside. The appellant - Ms. Leena Balkrishna Nair is acquitted of the charge levelled against her. The appeal is thus allowed.

26. The State shall revoke G.R. dated 8/4/2010 and warrant of the same date as they proceed on the assumption that the appellant is convicted and issue appropriate G.R., if necessary.

27. However, we direct that the appellant shall be detained in safe custody either in the Regional Mental Hospital, Yerwada if she needs further treatment or in some other appropriate jail or place and the jail authorities shall submit a report to the State Government forthwith whether the appellant can be released without danger of her doing injury to herself or to any other person and upon receipt of such a report from the jail authorities, the State Government shall take appropriate steps as envisaged u/s 338 of the Code in the matter of release of the appellant. We also direct that the office shall send a copy of this judgment to the State Government u/s 335(4) of the Code. We further direct that the operative part of this judgment be sent to the concerned jail authorities immediately.