
(2014) 06 BOM CK 0131
In the Bombay High Court
Case No : Criminal Appeal No. 1090 of 2006

Mustaq Ali Manullah Salmani	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 11-06-2014

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 307, 324, 354, 84

Citation : (2014) ALLMR(Cri) 2776

Hon'ble Judges : P.V. Hardas, J; Anuja Prabhudesai, J

Bench : Division Bench

Advocate : B.W. Kakade, Advocate for the Appellant; S.D. Shinde, APP, Advocate for the Respondent

Final Decision : Dismissed

Judgement

P.V. Hardas, J.—The appellant, who stand convicted for offence punishable under Sections 302, 324 and 354 of the Indian Penal Code and sentenced to imprisonment for life and to pay a fine of Rs. 3000/- in default of which to undergo further RI for one year, RI for two years and to pay a fine of Rs. 1000/-, in default of which to undergo further RI for 15 days and RI for one years and to pay a fine of Rs. 1000/- in default of which to undergo further RI for 15 days respectively, with a direction that the substantive sentences shall run concurrently, by the Additional Sessions Judge, Greater Bombay, by judgment dated 5/9/2006, in Sessions Case No. 59 of 2004, by this appeal questions the correctness of his conviction and sentence. Facts in brief as are necessary for the decision of this appeal may be stated thus:-

2. PW 12-PSI Haribhau Shere, who, on 27/10/2003, was attached to the Wadala Truck Terminus Police Station, received a telephone at 8.25 p.m. informing him that in the Shantinagar area, behind Ahmed Hotel, one person was assaulting a lady and her children. PW 12-PSI Shere accordingly forwarded the message to the night duty Police Inspector Mr. Kamble and thereafter along with the police staff and Police Inspector Mr. Kamble proceeded to the scene of the incident. On

reaching the scene of the incident, he was informed that the injured had been shifted to the Sion Hospital for treatment. He, therefore, proceeded to the Sion Hospital and observed the condition of injured-PW1-Tayyaba and her daughter Suphiya, aged 2 1/2 years and her son Sajidali, aged one year. PW 12-PSI Shere was informed that Sajidali had succumbed to his injuries and was declared dead by the Medical Officer. Accordingly, an inquest panchanama of the dead body of Sajidali was drawn in the presence of panchas at Exh. 19. Statement of PW1--Tayyaba was recorded at Exh. 13. On the basis of the said statement, an offence vide Crime No. 131 of 2003 under Sections 302, 307, 354 and 324 of the IPC was registered against the appellant. Further investigation was thereafter handed over to PW 13-PI Kamble.

PW 13-PI Kamble, who was also attached to the Wadala Truck Terminus Police Station had accompanied PW 12-PSI Shere to the scene of the incident and thereafter to the Sion Hospital. Further investigation was then entrusted to PW 13-PI Kamble. The scene of the incident panchanama at Exh. 37 was drawn in the presence of panchas. From the scene of the incident, certain articles were seized. On 28/10/2003 at about 4.30 a.m. the appellant was arrested in the presence of two panchas under arrest panchanama at Exh. 40. The appellant was referred for medical examination. The clothes on the person of the appellant were also seized under arrest panchanama. The clothes of PW 1-Tayyaba and deceased Sajidali were also seized under seizure memo at Exh. 21. On 29/10/2003 statements of witnesses were recorded and on 3/11/2003 a panchanama at Exh. 41 was drawn to ascertain if the pair of chappals belong to the accused. On 6/11/2003, the knife (Article A) shown to PW 1-Tayyaba, who had identified the same and a panchanama to that effect was drawn at Exh. 42. On 8/11/2003 a Test Identification Parade was held in the Arthur Road Jail by the Special Executive Officer and PW 8-Mohammed Shaikh and PW 10-Kasimali Shah participated in the Test Identification Parade and identified the appellant. On 28/11/2003, the seized articles were referred to the Chemical Analyzer under requisition at Exh. 43. Further to the completion of investigation, a charge-sheet against the appellant was submitted.

The injured had been initially examined by PW 6-Dr. Sabita Jivnani, who noticed the following external injuries on the person of PW 1-Tayyaba:-

- (1) Left lateral Chest contused lacerated wound 2 cm. x 1 cm.
- (2) Right chin, contused lacerated wound 3 cm. x 1 cm.
- (3) Right pre-auricular contused lacerated wound 2 cm. x 1 cm.
- (4) right parietal haematoma, 2 cm. x 1 cm.
- (5) Right side of face superficial burns, impressions polytrauma with burns.

Tayyaba was referred for X-ray of the chest. According to PW 6-Dr. Jivnani, the injuries were simple injuries. The medical case papers of Tayyaba are at Exh. 24, while the injury certificate of PW 1-Tayyaba is at Exh. 25. She has further opined

that injuries 1, 2 and 3 were possible by a sharp cutting edged weapon, such as sickle, knife etc.

On 27/10/2003 PW 6-Dr. Jivnani had examined injured Suphiya, a child aged about 2 1/2 years and had noticed frontal contused lacerated wound 1 cm. x 1 cm bone deep. She had referred Suphiya for skull X-ray. Suphiya was discharged from the hospital on 31/10/2013 at 1.30 p.m. The medical case papers of Suphiya are at Exh. 26, while the injury certificate is at Exh. 27.

Postmortem on the dead body of deceased Sajidali was performed by PW 7-Dr. Mukesh Ghuge who had noticed the following external injuries:-

- (1) Bruising around the left eye. Bruising of the sub-cutaneous tissues is seen.
- (2) Incised wound 3 1/2 cm. x 2 cm. on the right eye brow at medial aspect.
- (3) Incised wound 3 cm x 1 cm on the right chin.
- (4) 5 cm. above the left ear an incised wound 8.5 cm. x 2 cm. on the scalp bone deep.
- (5) Incised wound 2 cm. x 0.5 cm., 6 cm, behind the left ear on the scalp.

Hemorrhage was also noticed in the brain and PW 7-Dr. Ghuge opined that cause of death of Sajidali was due to multiple cranio cerebral injuries caused by heavy sharp edged weapon. The postmortem report is at Exh. 29. According to PW 7-Dr. Ghuge, the injuries sustained by Sajidali were sufficient in ordinary course of nature to cause his death.

3. On committal of the case to Court of Sessions, trial court vide Exh. 6 framed charged against the appellant for offence punishable under Sections 302, 324 and 307 of the IPC. Additional charge for offence punishable u/s 354 of the IPC was also framed on 6/1/2006. The appellant denied his guilt and claimed to be tried. Prosecution, in support of its case, examined 13 witnesses, while the appellant in his defence examined four witnesses. During the hearing of the appeal, the learned counsel for the appellant did not challenge the prosecution evidence relating to the infliction of injuries to the victim and the deceased. The defence of the appellant is of insanity and according to him on the date of the incident he was suffering from mental ailment, due to which he did not realize the nature of the act which he was doing or that the act which he had done was either wrong or contrary to law. The trial court, upon appreciation of the evidence, convicted and sentenced the appellant as afore-stated.

4. In order to effectively deal with the submissions advanced before us by the Mr. Kakade, learned counsel for the appellant and the learned APP, it would be useful to refer to the evidence of the prosecution witnesses.

Prosecution has examined PW 1-Tayyaba, the first informant as well as the injured witness and mother of deceased Sajidali. According to PW 1-Tayyaba, the appellant is the uncle of her husband PW 3-Riyazali. On the day of the incident

i.e. on 27/10/2003 at about 6.30 to 7.00 p.m., PW 3-Riyazali had asked the appellant, who had come there, to accompany PW 3-Riyazali to the doctor as Riyazali was experiencing some pain in his legs. The appellant accordingly accompanied Riyazali and both of them left the house. After some time, the appellant returned to the house of PW 1-Tayyaba and knocked on the door. At that time Tayyaba was cooking. As soon as the appellant came inside the house, he caught Tayyaba and starting kissing her. PW 1-Tayyaba resisted the appellant and shouted. The appellant took a knife, which was kept on the shelf and started stabbing Tayyaba with it. The appellant stabbed Tayyaba on her left wrist as well as under the arms, on the right side chin, right ear and right side of the head. Tayyaba extricated herself from the clutches of the appellant and ran outside the house. The children of Tayyaba, namely, Suphiya and deceased Sajidali were present in the house. On coming out of the house, Tayyaba became unconscious. She regained consciousness in the Sion Hospital. The Medical Officer examined Tayyaba and her children and declared Sajidali as dead.

5. In cross-examination, nothing of importance has been elicited which would in any manner affect the credibility of PW 1-Tayyaba. PW 1-Tayyaba has denied the suggestion that she was aware that the appellant was being treated in the hospital from 2001 as the appellant was insane. She has also denied the suggestion that the appellant was treated for insanity by a Medical Officer of Gorakhpur. She has also denied the suggestion that due to mental illness, the appellant had committed the offence.

6. Prosecution has examined PW 3-Riyazali, who deposes about the appellant accompanying him to the Medical Officer and about the appellant returning back. PW 3-Riyazali further deposes that PW 2-Juned came running to him and informed him that the appellant had assaulted PW1-Tayyaba and her children with knife. Riyazali, therefore, went home and noticed his children and Tayyaba with injuries. Riyazali along with his brother removed the injured to the Sion Hospital for treatment. The Medical Officer pronounced Sajidali as dead. Tayyaba and her daughter Suphiya were admitted in the Sion Hospital for medical examination. Riyazali further deposes that he had questioned Tayyaba as to what had happened and Tayyaba had informed him that the appellant had attempted to molest her and on her refusal, the appellant assaulted Tayyaba and her children with knife. Riyazali has been cross-examined and again nothing of substance has been elicited in the cross-examination. Riyazali has denied the suggestion that the appellant was insane and Riyazali was aware about the insanity of the appellant.

7. Prosecution has examined PW 2-Juned, who deposes that on the day of the incident, he was working in his hair-cutting saloon, which was situated at a distance of 20 to 30 paces from the house of Tayyaba. He further deposes that about 8.05 p.m. to 8.10 p.m. he had noticed Tayyaba outside his shop and Tayyaba was crying. He deposes that he had noticed bleeding injuries on Tayyaba and Tayyaba had informed him that the appellant had assaulted her and her

children. Juned deposes that on hearing this, he was proceeding towards the house of PW 1-Tayyaba and on the way, met the appellant who was being assaulted by the residents of the locality. On coming to the house of Tayyaba, he noticed Sajidali lying with injuries on the ground and had also noticed Suphiya with injuries.

8. Prosecution has examined PW 8-Mohammed Haki Shaikh and PW 10-Kasimali Shah as witnesses who had reached the scene of the incident on hearing the cries of Tayyaba. PW 8-Mohammed deposes that on the day of the incident he was present in his grocery shop and at about 8.30 p.m. two ladies residing in his area had come to his shop and requested him to offer help. Those two ladies informed him that one person was assaulting wife and children of Riyazali with a knife. On hearing this, PW 8-Mohammed immediately ran to the house of PW 3-Riyazali and noticed daughter of Riyazali lying on the floor with injuries. He also noticed the appellant assaulting the other child of Riyazali with an iron stove. He has identified the said person as the appellant and deposes that he had noticed a knife in the hand of the appellant. When PW 8-Mohammed scolded the appellant, the appellant informed him that he would kill the person who enters the room. Mohammed, therefore, cried out for help for catching the appellant and at that time, some boys, who were playing on the road ran to the house of PW 3-Riyazali and PW 8-Mohammed returned to his shop. He states that he had identified the appellant in the Test Identification Parade which was held in the Arthur Road Jail.

9. In cross-examination, he has admitted that when he had noticed the appellant, the appellant appeared to him to be a dangerous person. He was confronted with portion marked "A" from his statement that the appellant had picked up a pot in which Dal was being cooked and had hurled the contents at the woman who was present inside the room. He has admitted in cross-examination that on seeing the persons in the house, the appellant had lifted the burning stove and thrown it with force on the floor.

10. PW 10-Kasimali deposes that he was standing at the telephone booth waiting his turn for making a telephone call and at that time he had noticed an injured lady coming from the lane. The injured lady was shouting for saving her. On hearing her cries, PW 10-Kasimali ran towards the lane and when he reached the house of the injured lady, he met other persons. All of them entered the house of the lady. On entering the house, they noticed one person who was holding an iron stove in his hand and was sprinkling kerosene from the iron stove by turning it upside down. He also noticed one girl and a boy lying in the room with injuries. Kasimali, along with others, apprehended the said person and brought him outside and on arrival of the police, handed him over to the police. Kasimali further deposes at having identified the appellant in the Arthur Road Jail. In cross-examination, he has admitted that he was not acquainted with the appellant prior to the incident. In respect of the incident he has admitted that about 10 to 15 persons had gathered near the house of the injured lady.

11. The appellant has examined DW1-Harshida Bhansali, a Medical Officer and a

Psychiatric, who was attached to the Grant Medical College. According to DW1-Harshida, she used to visit the Arthur Road Prison in November, 2004 and had examined the appellant. After examining him, she had diagnosed the appellant to be suffering from psychosis, not otherwise specified. According to DW1-Harshida, the appellant was suffering from some form of Psychotic behaviour. According to her, due to inadequate information, she was unable to come to any specific diagnosis. According to her, a patient suffering from such ailment can "lose sense for some time". She has admitted that she had seen the appellant in the Arthur Road Prison for the first time on 11/11/2004 with a history of abnormal behaviour about a day prior to 11/11/2004. She has further stated, "I cannot say or give my opinion whether such patient like Mustakali can be insane for a moment". The symptoms of such patient were talking himself, singing songs, decrease in sleep and aggressive behaviour. According to her, most patient can become normal if proper treatment is provided. She has admitted that she had visited the Arthur Road Jail on 17 occasions and had examined the appellant. Out of 17 occasions, the appellant was normal on 11 occasions and for the rest of the occasions she had seen him normal. She corrected herself to state that on 11 occasions she had found him to be abnormal, while on the remaining occasions she had found him to be normal.

12. In cross-examination, on behalf of the prosecution, she has admitted that on 1/7/2005, she had visited the Arthur Road Jail and had examined the appellant. On that day, his mental status examination was done and he was found to be absolutely normal. She has further admitted that prior to 11/11/2004, she had not examined the appellant at any time and after 1/7/2005 she had not examined the appellant.

This witness has not produced the medical case papers in which the observations regarding the behaviour of the appellant may have been noted, nor this witness has produced on record the medicines which were prescribed. Thus, this witness deposed on the basis of memory as to what her observations were.

13. The appellant has examined DW2-Dr. Sanjay Vathore, who was attached to the Arthur Road Jail as a Chief Medical Officer. In the examination-in-chief he was shown the medical report signed by the Chief Medical Officer with a covering letter signed by the Superintendent of Bombay Central Prison dated 18/2/2005 in respect of the appellant. The Chief Medical Officer then was one Dr. Azahar Pathan. He has identified the handwriting and the signature of Dr. Azahar Pathan and accordingly the trial court exhibited the report at Exh. 55. In cross-examination, he has admitted that he had not personally examined the appellant and could not state since when the appellant was a prisoner in the Bombay Central Prison.

The appellant made no attempts at examining Dr. Azahar Pathan and consequently the report of Dr. Azahar Pathan at Exh. 55 has not been proved. What has been proved is the signature of Dr. Azahar Pathan and the report being in the handwriting of Dr. Azahar Pathan without the contents being proved. Since

the report was based on the opinion of Dr. Azahar Pathan, consequent upon examination of the appellant, it was incumbent for the appellant to have examined Dr. Azahar Pathan in order to prove the contents of the report at Exh. 55.

14. The appellant has examined DW3-Barsati Salmani, brother of the appellant, who states that the appellant used to talk himself and used to sing songs and used to wonder here and there. The appellant used to break the household articles. The appellant was behaving in this manner since 2001. The appellant was examined by a Medical Officer of Gorakhpur. He had tendered in evidence the prescription given by Dr. Prakash Beri and the case papers. The trial court did not exhibit the said documents as obviously Dr. Prakash Beri had not been examined by the appellant and the contents of the said documents could not be proved by DW3-Barsati.

15. The appellant has examined DW4-Anjumbano Salmani, wife of the appellant, who deposes that she was married to the appellant about 9 years prior to the incident. According to her, the appellant was not behaving properly with her. The appellant used to assault her and used to wonder here and there and used to sing songs. The appellant also used to talk to himself. The appellant had been shown to one mendicant, but the appellant had not improved. The appellant was thereafter under the treatment of a Medical Officer from Gorakhpur. The appellant had become normal for a period of one month and thereafter the behaviour of the appellant was abnormal.

16. Learned counsel for the appellant has urged before us that in the light of the defence evidence, it would be apparent that the appellant was a patient of some mental disorder and his behaviour was abnormal and consequently the appellant is entitled to be given the benefit of Section 84 of the IPC. It is further urged before us by the learned counsel for the appellant that the behaviour of the appellant at the time of the incident i.e. (i) not closing the door of the house on entering the house of PW 1-Tayyaba; (ii) remaining at the scene of the incident and making no attempt at fleeing from the scene of the incident; (iii) the appellant hurling the contents of the pot which contained boiling Dal; (iv) sprinkling kerosene in the house, are all symptoms which would indicate that the appellant, at the time of the incident, due to insanity, was not capable of understanding the nature of the act which he was doing or what he had done was wrong or contrary to law. The learned APP has urged before us for dismissal of the appeal on the ground that there is no evidence at all to indicate that the appellant at the time of the incident was suffering from a mental ailment, due to which the appellant did not realize the nature of the act which he was doing. The learned APP has also urged before us that the defence evidence does not establish the defence available to an accused u/s 84 of the IPC.

17. It is not that in the event of every mental aberration that an accused is entitled to claim the benefit of Section 84 of the IPC. It is only when the accused is able to establish that he was suffering from a mental ailment, due to which he

was incapable of knowing the nature of the act or that what he is doing is either wrong or contrary to law that the benefit of Section 84 of IPC can be given. The accused can establish the insanity on the basis of direct or circumstantial evidence. The behaviour of the accused just before the incident, at the time of the incident and after the incident are relevant factors. The family history of any mental ailment is also important in judging the behaviour of the appellant at the time of the incident. The defence evidence of the two doctors i.e. D.W. 1-Hardshida Bhansali and DW2-Sanjay Vathore does not assist the appellant at all. The appellant ought to have examined the Medical Officers who had treated him. On record, there is nothing to indicate that the appellant was suffering from a particular mental ailment, due to which the appellant was incapable of understanding the nature of the act which he was doing. The behaviour deposed to by DW3--Barsati Salmani and DW4-Anjumbano Salmani are not such as would lead the court to draw an inference that the appellant was insane. The symptoms which are deposed to by these two defence witnesses are about appellant talking to himself, wondering here and there and singing songs and breaking household articles. Neither DW3-Barsai nor DW4-Anjumbano has deposed about the behaviour of the appellant on the day of the incident. They have also not deposed about the behaviour of the appellant immediately after the incident. The appellant has not questioned the police officers who arrested him and has not elicited any abnormal behaviour. The behaviour of the accused in not closing the door, hurling the contents of the pot containing boiling Dal and sprinkling kerosene by themselves would not lead to an inference that the appellant, at the time of the incident, was incapable of knowing the nature of the act which he was doing.

18. The appellant was perfectly normal on the day of the incident and this is apparent as the appellant had accompanied PW 3-Riyazali to the Medical Officer and thereafter had returned to the house of Riyazali. On PW 1-Tayyaba opening the door, the appellant embraced her and attempted to kiss her. The design of the appellant was apparent that he had entered the house of Tayyaba in order to outrage her modesty. The advances of the appellant were repelled by PW 1-Tayyaba which enraged the appellant to an extent that the appellant grabbed the knife on the shelf and stabbed Tayyaba. The appellant was enraged and, therefore, had stabbed Suphiya and had killed Sajidali. In that rage, the appellant had sprinkled kerosene possibly with a view to set the house ablaze. All these circumstances, according to us, are not the circumstances which would lead the court to infer or record a finding that the appellant, at the time of the incident, was incapable of understanding the nature of the act which he was doing. In fact, when the witnesses attempted to enter the house of PW 1-Tayyaba, the appellant had told them that he would kill anyone who enters the house. This would certainly indicate that the appellant was normal with all his faculty alert and the instinct of self reservation was predominant.

19. A reference at this stage may usefully be made to the judgment of the Supreme Court in Dahyabhai Chhaganbhai Thakker Vs. State of Gujarat, The

Supreme Court, at paragraph 9, has observed thus:-

"9. When a plea of legal insanity is set up, the court has to consider whether at the time of commission of the offence the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. The crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. Whether the accused was in such a state of mind as to be entitled to the benefit of Section 84 of the Indian Penal Code can only be established from the circumstances which preceded, attended and followed the crime."

20. The learned counsel for the appellant has placed reliance on the judgment of the Division Bench of the Orissa High Court in *Ajaya Mahakud Vs. State of Orissa*, The accused therein was accused of pushing his young four year old child into fire which resulted in his death. The offence was committed by the accused with brutality and in open space. The accused had made no attempt at concealment. In the facts of that case, therefore, the Division Bench extended the benefit of Section 84 of IPC.

Reliance is also placed on the Division Bench Judgment of this court in *Balu Ganpat Koshire Vs. State of Maharashtra*, In the facts and in the evidence of the said case, the Division Bench came to the conclusion that the accused had established that he was suffering from insanity and thus was entitled to the benefit flowing from Section 84 of the IPC.

Reliance is also placed by the learned counsel for the appellant on the judgment of the Supreme Court in *Ratan Lal Vs. The State of Madhya Pradesh*, The Supreme Court came to the conclusion that on the basis of the behaviour of the accused on the day of the occurrence, failure of the police to lead evidence as to his condition when the accused was in custody and the medical evidence that the accused was insane within the meaning of Section 84, the Supreme Court accepted that the accused was insane at the time when the offence was committed.

Reliance is also placed on the Division Bench Judgment of the Calcutta High Court in *Kamala Bhuniya Vs. State of West Bengal*, In the facts of that case the Division Bench of the Calcutta High Court found that since no attempt was made by the appellant to flee or to remove incriminating weapon from the scene of the occurrence and the evidence of the relations between the appellant and her husband being cordial and the fact that there was no motive for the crime as well as the fact that the Investigating Officer at the initial stage had recorded about the mental insanity of the appellant, it was held that the appellant was insane and was incapable of appreciating the consequence of her act at the time of commission of offence.

Reliance is also placed on the Division Bench Judgment of the Orissa High Court in *Raghu Pradhan Vs. State of Orissa*, In this case, the medical certificate of the appellant therein disclosed that he was suffering from cerebral contusion and

prior to the occurrence, the appellant was becoming insane periodically during which he was assaulting persons at random. After the occurrence, the medical report was that there was contusion in the brain. There was also absence of any motive for the appellant to commit the crime. In that background, therefore, the court extended the benefit of Section 84 to the accused.

21. The aforesaid judgments cited by the learned counsel for the appellant, in our opinion, are inapplicable to the facts of the present case. In the present case, the appellant had gone to the house of PW1-Tayyaba with an intention to outrage her modesty and on Tayyaba repelling the advances of the appellant, the appellant in a fit of rage stabbed Tayyaba and her children and in that fit of rage was attempting to set the house of Tayyaba ablaze. The appellant could not flee from the scene of the incident as, on hearing the cries of Tayyaba, the nearby residents had gathered and had subsequently apprehended the appellant. The behaviour of the appellant, at the time of the incident, was not such as would impel the court to record a finding that the appellant was insane and, therefore, was incapable of understanding the nature of the act which he was doing. The appellant was perfectly normal and was behaving normally. There is no evidence regarding the abnormal behaviour of the appellant a few days prior to the incident or on the day of the incident and immediately subsequent to the incident. The evidence of DW1-Harshida Bhansali and DW2-Sanjay Vathore do not, in any manner, establish legal insanity and consequently since the prosecution has proved the offence against the appellant beyond reasonable doubt and the appellant has failed to establish his defence u/s 84, the appeal filed by the appellant deserves to be dismissed. Accordingly, Criminal Appeal No. 1090 of 2006 is dismissed, confirming the conviction and sentence of the appellant.