
(2022) 09 BOM CK 0138

In the Bombay High Court

Case No : Criminal Appeal No. 821 Of 2015, Interim Application No. 2784 Of 2022

?Nabi Hasan Noor Hasan Khan

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 28-09-2022

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 235(2), 313
Indian Penal Code, 1860 — Section 302
Evidence Act, 1872 — Section 106

Citation : (2022) 09 BOM CK 0138

Hon'ble Judges : A.S. Gadkari, J;Milind N. Jadhav, J

Bench : Division Bench

Advocate : Tushar N. Sonawane, S.S. Hulke

Final Decision : Dismissed/Disposed Of

Judgement

Milind N. Jadhav, J

1. This Appeal challenges the Judgment and order dated 05.01.2015 passed by the Additional Sessions Judge, Borivali, Mumbai (hereinafter referred to as "Trial Court") in Session case No.62 of 2011 convicting Appellant under Section 235(2) of the Criminal Procedure Code, 1973 (for short "Cr.P.C.") of offence punishable under Section 302 of Indian Penal Code (for short "IPC") and sentenced to undergo imprisonment for life and to pay fine of Rs.25,000/-, in default, to undergo further rigorous imprisonment for six months.

2. Appellant stands convicted for strangulating and committing culpable homicide amounting to murder of his 19 year old wife Santoshi (deceased) in the night of 28.10.2012.

3. Prosecution case in brief is thus:

3.1. Appellant got married to Santoshi one year prior to the incident. He was a hawker. After marriage both resided in a hutment near Moinia Masjid, Malwani,

Malad along with Appellant's two brothers and their spouses. According to prosecution, Appellant was addicted to vices and used to quarrel with her. A few months before the incident Appellant assaulted Santoshi and injured her left hand. Santoshi was treated in Rajawadi hospital. Appellant sought forgiveness from PW-1 – First Informant/mother of Santoshi and tendered apology for his behavior. Hence PW-1 did not lodge any complaint against him. Two days before incident, on 26.12.2010, Santoshi reached PW-1's house situated nearby in Bismillah Chawl near Moiniya Masjid, Malwani, Malad and informed her that Appellant had assaulted her severely under the influence of alcohol. Santoshi stayed in PW-1's house for the next two days and did not return back to Appellant's house.

3.2. On 28.10.2012, at around 8:00 p.m. Appellant visited PW-1's house and requested her and other family members present, to send Santoshi back to her matrimonial house, assuring them that he would treat her properly. On his assurances PW-1 sent Santoshi back with him.

3.3. Santoshi's dead body was discovered lying in a nearby forest area by local people at about 07:30 a.m. on the following morning. PW-10, first Investigating Officer (for short "I.O."), received a phone call about spotting of a dead body at about 8:20 a.m. in the morning of 29.10.2012. He reached the spot of incident, 300 feet away Moiniya Masjid along with PW-1 and PW-9 (photographer).

3.4. PW-1 and PW-10 along with other persons gathered at the spot and saw that Santoshi's neck was strangulated with her dupatta, her tongue had protruded outside her mouth and her nostrils were bleeding.

3.5. PW-10 conducted Spot cum Inquest panchanama (Exh.33) in the presence of PW-8, pancha witness. PW-6 Dr. Maurya, was summoned to the spot and after examining Santoshi at around 9:15 a.m. declared her dead. He issued the death certificate (Exh.30). Santoshi's body was sent to the hospital for autopsy. PW-5 conducted autopsy and prepared postmortem Report (Exh.15). Articles and samples collected from the spot were sealed and sent for obtaining Chemical Analyzer's report, CA Reports were received (Exh.25 to Exh.28) and prove in evidence. The "dupatta" found strangulated around Santoshi's neck was recovered and seized and marked as article A. PW-5 in the PM Report has opined the cause of death being asphyxia due to strangulation (unnatural). He has notified the following injuries in the PM Report (Exh.15):-

External injuries:

- 1) Total neck circumference of at mid thyroid level is 28 cm.;
- 2) Evidence ligature mark over neck, anteriorly it is horizontal 6 cm. vertically below tip of chin. It is continuous and passes on both the side of neck laterally and horizontally encircling complete neck 6 cm below left ear lobule and 7 cm below right ear lobule respectively. Posteriorly it is 3 cm below posterior hair line, ligature mark is more prominent on anterior aspect and faint on posterior aspect

of neck. Ligature mark is 28 cm long and 2 cm wide. It is reddish colored.;

3) Both side superior horn of thyroid cartilage ruptured under ligature mark.

4. After completing investigation charge sheet was filed in the court of learned Metropolitan Magistrate, Borivali, Mumbai. Since offence under Section 302 IPC is exclusively triable by the Court of Sessions, case was committed to Sessions Court for trial. Charge was framed against Appellant vide (Exh.2) under Section 302 IPC. Its contents were read over and explained to Appellant in vernacular to which he pleaded not guilty and claimed to be tried; his defence was of total denial.

5. We have heard Mr. Tushar N. Sonawane, learned Advocate appearing on behalf of Appellant and Mr. S. S. Hulke, learned APP appearing on behalf of State and with their able assistance perused the evidence and record of the case.

It is seen that the present case is based on circumstantial evidence. Prosecution has relied upon "last seen together" and "motive" theories which are supported by deposition of prosecution witnesses PW-1, PW-3 and PW-4. In addition prosecution has also relied upon extra judicial confession given by Appellant to Fatima Shamshad Shaik (PW-2) a nearby resident in the locality who was well acquainted and known to Appellant and Santoshi's families as an additional strong piece of circumstantial evidence. She has deposed that immediately after the incident, Appellant came to her house at about 8:00 to 9:00 p.m. on 28.10.2012. At that time Appellant was in a frightened condition; he asked her for Rs.100/- and she gave it to him; thereafter she inquired with him about his anxiety and he disclosed to her that he had killed Santoshi. PW-2 slapped him and asked him to disclose the reason, to which he did not reply. PW-2 thereafter immediately went to the house of PW-1, but found it locked; she then proceeded to the house of Appellant and informed his sister Ruksar (PW-3), her husband Jamir and another sister Ruksanha about the disclosure made by Appellant. All of them immediately reached back to PW-3's house where Appellant was present. Ruksar (PW-3) inquired with him and he once again disclosed to her that he strangled Santoshi with her dupatta and killed her. Thus, it is seen that Appellant has given extra judicial confession to PW-2 and PW-3 about the crime. Both PW-2 and PW3 admittedly are not strangers to Appellant. Cross-examination of both PW-2 and PW-3 reveals that Appellant is well acquainted with PW-2 and PW-3 and has faith in them. Hence the extra judicial confession given by Appellant to these prosecution witnesses forms an important piece of circumstantial evidence in the chain of circumstances for indicting Appellant.

6. That apart, deposition of PW-4 is relevant to prove the "last seen together" theory. In his deposition he has stated seeing Appellant and Santoshi together at about 07:30 to 08:00 p.m. proceeding towards Appellant's house. He is also well acquainted with Appellant and Santoshi and their respective families, being a resident of the same locality. Though there is minor discrepancy in the time mentioned by PW-4 and PW-1 with respect to the time of having last seen

Appellant with Santoshi and it has been argued vehemently as a material contradiction by the learned advocate appearing for Appellant, however we do not think that this slight variation in the time mentioned by these witnesses would militate against the prosecution's case. PW-1 and PW-3 have very clearly in their deposition stated that Appellant and Santoshi left PW-1's house at about 08:00 to 08:30 p.m. PW-4 has thereafter immediately seen Appellant and Santoshi proceeding towards Appellant's house at around 07:30 to 08:00 p.m. Thus PW-1, PW-3 and PW-4 are witnesses who have last seen Appellant together with Santoshi on the previous night. It is seen that Santoshi's body was found at around 7:00 am. On the following morning. Appellant was the person who was last seen with Santoshi on the previous night by three prosecution witnesses. Appellant in his statement given under section 313 of Cr.P.C. has not given any plausible explanation about him accompanying Santoshi after 8:00 p.m. and what transpired thereafter.

7. Another submission argued by learned Advocate for Appellant is the proximity of time between the last seen together time and discovery of dead body. It is submitted that there is a substantial time gap of more than 11 hours before the body was discovered and hence the last seen together theory should not be considered by this court. We are however afraid to state that from the evidence of prosecution witnesses it is clearly established and proved that Appellant had taken Santoshi along with him from her paternal house at around 08:00 p.m. on 28.10.2012. Appellant's answers in his 313 statement are of total denial. Hence, Appellant's submission cannot be believed in the absence of any cogent explanation given by him in this respect. The conduct of Appellant is therefore unnatural.

8. One more important piece of circumstantial evidence which can be derived from deposition of prosecution witnesses point towards the "motive". Evidence of PW-1 and PW-3 clearly reveal that Appellant use to intermittently harass and physically abuse Santoshi. It is come in evidence that just two days before the incident on 26.10.2012, Appellant had quarreled with her and physically assaulted her severely. Though motive is a strong piece of circumstantial evidence, it certainly cannot be lost sight of. In the present case prosecution has proved the guilt of Appellant beyond all reasonable doubts. Appellant has however failed to prove as to how death of Santoshi was caused on the date of incident, since he was the only person last seen together with her. It is stated that it was only to the exclusive knowledge of Appellant as to what transpired after 8:00 p.m. and therefore the burden of proving that fact was upon him. Reappreciating the evidence, it is seen that Appellant has failed to discharge the burden under Section 106 of the Indian Evidence Act, about the facts which were exclusively within his knowledge. The medical evidence and injuries seen on Santoshi's body clearly point out that it is a case of murder amounting to culpable homicide.

9. Learned advocate appearing for Appellant has referred to and relied upon the

following decisions of the Supreme Court in support of his submissions.

1. Shailendra Rajdev Pasvan and Ors. v/s State of Gujrat and Ors. (2020) 14 SCC 750;
2. Ravinder Singh Alias Kaku v/s State of Punjab (2022) 7 SCC 581;
3. Ram Niwas v/s State of Haryana 2022 SCC Online SC1007.

9.1. In the case of Shailendra (supra) the Supreme Court while discussing about the proximity of time between the "last seen together" theory has held that in a case resting on circumstantial evidence, the lapse of time between the point when the accused and deceased are seen together and when the deceased is found dead ought to be so minimal, so as to exclude the possibility of any intervening event involving the death at the hands of some other person. In other words, Supreme Court has held that the "last seen together" theory comes into play where the time gap between the point of time when the accused and deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible. The Supreme Court has further held that in the absence of any other positive evidence to conclude accused and deceased were last seen together, it would be hazardous to conclude guilt in such a case. In the present case, though the time gap is 11 hours, the same cannot come to the rescue of Appellant in the absence of any material or explanation by Appellant and more specifically in view of the deposition of PW-1, PW-3 and PW-4 having last seen them together.

9.2. In the case of Ravinder Singh (supra) learned Advocate for Appellant has drawn our attention to Head Note "C" which summarizes the principles for convicting an accused on the sole basis of circumstantial evidence. He submitted that when a conviction is based solely on circumstantial evidence, the Supreme Court has held that the chain of circumstance must be so conclusive enough that it should sustain a conviction. In the present case as discussed and alluded to hereinabove, we find that the chain of circumstances has been adequately proved by the prosecution beyond all reasonable doubts.

9.3. In the case of Ram Nivas (supra) the Supreme Court once again while referring to the landmark decision in the case of Hanumant v. State of Madhya Pradesh , AIR (1952) SC 343 on circumstantial evidence has held that the said decision has been uniformly followed and applied in a large number of later decisions upto date and held that there has to be a chain of evidence so complete so as not to leave any reasonable ground for a 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. Applying this principle enunciated by the Supreme Court to the facts and circumstances of the present case, it leaves no room for doubt that Appellant is the author of the crime.

10. In view of the above discussion and findings, we do not find any reason to

interfere with the well reasoned Judgment and Order dated 05.01.2015 passed by learned Trial Court convicting Appellant for offence punishable under Section 302 IPC. The same is therefore upheld.

11. Criminal Appeal No.821 of 2015 is hereby dismissed. Interim Application No.2784 of 2022 is accordingly disposed of.

12. Before parting with the Judgment, we would like to place on record appreciation for the efforts put in by Mr. Tushar N. Sonawne, learned Advocate appointed by the High Court Legal Services Committee, Mumbai for espousing the cause of Appellant; he was thoroughly prepared in the matter and rendered proper and able assistance to the Court.