
(2005) 03 BOM CK 0129
In the Bombay High Court
Case No : Criminal Appeal No. 245 of 2001

Nandu	Vs	APPELLANT
State of Maharashtra		RESPONDENT

Date of Decision : 30-03-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 174
Penal Code, 1860 (IPC) — Section 201, 302

Citation : (2005) 03 BOM CK 0129

Hon'ble Judges : S.T. Kharche, J;D.D. Sinha, J

Bench : Division Bench

Advocate : M.R. Daga, for the Appellant; D.B. Patel, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

S.T. Kharche, J.—This criminal appeal is directed against the judgment and order of conviction dated 26.6.2001 passed by the learned Additional Sessions Judge, Achalpur, in S.T.No.48 of 1998, whereby the appellant/accused has been convicted of the offence punishable u/s 302 of Indian Penal Code and sentenced to imprisonment for life and also to pay a fine of Rs.500/-m in default to suffer rigorous imprisonment for two months. The appellant/accused has also been convicted of the offence punishable u/s 201 of Indian Penal Code and sentenced to suffer rigorous imprisonment for six months and to pay a fine of Rs.200/-, in default to suffer rigorous imprisonment for one month.

2. The case of prosecution, in brief, is required to be stated as under:

(a) The appellant/accused was in service at Sandeep Welding shop at Chandur Bazar whereas his niece Kirti Bhagat along with her husband. Babasaheb Bhagat (P.W.2) was living at Morshi.

(b) On 30.12.1997 at about 12 O'clock in the noon the accused went to Morshi to take Kirti to Jalnapur to participate in the birthday programme of son of his

elder brother. They went by bus at about 2.00 p.m. and got down at Ridhapur from where they went to village Ashatoli. They reached there at about 6.00 or 6.30 p.m. and went to the house of Panchfulabai (P.W.1) who was the distant relative of the accused. Thereafter the accused took Kirti in the said village to take the blessings of Goddess Mangladevi as she could not bear a child out of the wedlock, but the said Goddess Mangladevi was not present in the village and therefore he along with Kirti left Ashatoli and then came to Jalnapur.

(c) While on the way to Jalnapur, the accused killed Kirti by strangulation and then brought her dead body in the nullah, poured kerosene on her person and set her on fire with an intention to destroy the dead body by burning. He had thrown the bag of Kirti in one well and he had also removed the golden necklace from her neck and sold the same on 1.1.1998 to the gold-smith Manohar (P.W.3).

(d) As Kirti did not return to home for three-four days, her husband Babasaheb started searching of her at Chandur Bazar and also asked the accused regarding her whereabouts, but he did not give any satisfactory explanation.

(e) On 2.1.1998, at about 3.00 p.m., one Dilip Kale, r/o Jalnapur, found the dead body of an unknown lady partly burnt lying in a brook. Therefore, he immediately went to police station Chandur Bazar and lodged the first information report, on the basis of which A/D case No. 1/98 was registered u/s 174 of the Code of Criminal Procedure.

(f) Police head constable Ramesh (P.W.11) visited the spot of incident and found half burnt dead body of an unknown woman lying there and it was not possible to identify her. He found that one piece of cloth was inserted in the mouth of the said dead body. Head Constable Ramesh drew the spot panchanama (Ex.41) as well as the inquest panchanama (Ex.42) in presence of panch witnesses. He then seized one red colour partially burnt piece of blouse, one partially burnt piece of white brassier, one partially burnt piece of sari, one partially burnt piece of peticoat as well as ash mixed with soil and ordinary soil from the spot of occurrence. He then forwarded the dead body to the medical officer at Cottage Hospital, Achalpur, for the purpose of post-mortem examination. Post-mortem was conducted on 3.1.1998 and the medical officer opined that the probable cause of death was asphyxia due to obstruction in air way passage due to cloth piece in the mouth and pressure over nostrils. Accordingly, he had issued the post-mortem report.

(g) P.S.I.Gopinath (P.W.13) recorded the statements of the witnesses including Panchfula (P.W.1), Babasaheb (P.W.2) the husband of the deceased and Vatsalabai (P.W.5), who is the mother of the deceased on 6th and 7th January 1998 respectively. The photographs of deceased Kirti were shown and it was revealed that the dead body of unknown woman was that of Kirti. The accused was arrested on 5.1.1998 and thereafter on 8.1.1998 he was interrogated in presence of panch witnesses while in police custody and he gave a statement that he would show the spot of incident where the dead body was found lying.

This statement was reduced into writing in the form of memorandum panchanama (Ex.49). Thereafter the accused led the police party and the panch witnesses to the said spot and discovery panchanama (Ex.49-A) was drawn. P.S.I.Gopinath also seized some articles from the spot of incident.

(h) P.S.I.Arvind (P.W.12) took up the investigation of this crime. He had interrogated the accused on 17.1.1998 while he was in police custody and the accused had furnished information in presence of panch witness Suresh (P.W.7) that he had thrown one bag into the well and he was ready to point out the same. This statement of the accused was reduced into writing in the form of memorandum panchanama. Thereafter the accused led the police party and the panch witnesses to the said well which was situated in the field of Sonori Shiwar. It was found that inside the well one purse-cum- bag was floating on the water. It was taken out and on inspection it was found to contain one lady knicker, one brassier, one lady handkerchief and one blouse etc. These Articles were Seized vide discovery panchanama (Ex.45-A).

(i) On 19.1.1998 the accused while in police custody was again interrogated in presence of panch witnesses and he furnished information that he had sold the necklace (Mangalsutra) to the goldsmith Manohar (P.W.3) and he was ready to point out the shop of the said goldsmith. This information furnished by the accused was recorded in the form of memorandum panchanama. Thereafter the accused led the police party and the panch witnesses to the shop of Manohar. The latter had produced one sold gold ball which was seized as per seizure panchanama (Ex.63-A). It was revealed that Manohar had recorded the entry in the register kept at his shop and had also obtained the signature of the accused and had also issued the receipt which were seized by police. It was also revealed that the accused had sold the necklace to the goldsmith in the fake name as Rajesh Akaram Hiwase.

(j) The muddemal articles of this crime were forwarded to chemical analyser for the purpose of examination and analysis on 10.3.1998. The report of chemical analyser revealed that the results of the tests for the detection of kerosene residues on partly burnt piece of cloth, partly burnt piece of brassier, partly burnt piece of saree, partly burnt piece of peticoat, piece of bag, partly burnt printed cloth piece and ash mixed with earth are positive. On completion of investigation, charge-sheet against the accused was filed in the Court of J.M.F.C.

3. On committal of the case of the Court of Sessions, the learned Additional Sessions Judge framed and explained the charge to the accused to which he pleaded not guilty and thus the trial proceeded with. The prosecution in order to bring home guilt at the doors of the accused has examined as many as 13 witnesses and relied on circumstantial evidence.

4. The defence of the accused is that of total denial. He did not examine any defence witness. The learned Additional Sessions Judge on appreciation of the evidence recorded the finding that Kirti died as a result of homicidal death and

that the complicity of the accused in committing this crime has been duly established. He also recorded the finding that the accused tried to burn the dead body with an intention to cause disappearance of the evidence in order to screen himself from the legal punishment. Consistent with these findings, he convicted the accused and sentenced him as mentioned above. This judgment and order of conviction is challenged in this appeal.

5. Mr.Daga, learned counsel for the accused, contended that the entire case of the prosecution rests on circumstantial evidence and only two stray circumstances have been considered by the learned Additional Sessions Judge - (i) the deceased was last seen in the company of the accused, and (ii) the subsequent conduct of the accused u/s 8 of the Evidence Act. He contended that the circumstances from which the conclusion of guilt has been drawn have not been duly established and they are inconsistent with the hypothesis of the guilt of the accused. He contended that a dead body of unknown female was found lying in the nullah which is situated in the field of one Dilip Kale on 2.1.1998 and the post-mortem was effected on 3.1.1998 by the medical officer who opined that the probable cause of death was asphyxia due to strangulation. He contended that the said dead body was not got identified and initially accidental death case was registered and during the course of investigation for the first time on 6.1.1998 it was revealed that the deceased had left her matrimonial home along with the accused. He contended that there is no satisfactory evidence on record to show that the dead body of unknown female was that of Kirti and the identification of the woman, who was found missing from her matrimonial home, by showing her photographs to the witnesses do not connect the link between the unknown dead body of the female and the alleged murder of Kirti.

6. He contended that the spot where the dead body was found lying was already known to police and, therefore, the discovery panchanama (Ex.49-A) of the spot which was drawn on 8.1.1998 after recording the memorandum of the accused is not of any relevance and has been rightly disbelieved by the learned Additional Sessions Judge. He contended that though one bag was discovered in consequence of the information furnished by the accused on 17.1.1998, the articles found in that bag were not shown to Babasaheb (P.W.2) - The husband of the deceased or Vatsalabai (P.W.5) - the mother of the deceased and in absence of identification of those articles no reliance could be placed on the discovery panchanama of the articles said to be belonging to the deceased.

7. He contended that the golden necklace belonging to the deceased is said to have been sold to the witness Manohar (P.W.3) and the entries were recorded in the register by this witness regarding the sale. He contended that though the accused is said to have pointed out the shop of Manohar and the discovery of the ball made up of gold has been made as per the discovery panchanama (Ex.63-A), there is no satisfactory evidence on record to show that this is the same gold ball which was prepared by the witness Manohar after melting the golden

necklace and that the necklace was belonging to the deceased. There is no evidence to show that the necklace belonging to the deceased was sold by the accused and in absence of any link in the case of the prosecution, no reliance could be placed on the so-called discovery of golden ball. He contended that in such circumstances, the impugned judgment and order of conviction cannot be sustained in law and the accused deserves to be acquitted by giving him benefit of doubt.

8. The learned A.P.P. supports the impugned judgment and order of conviction and contended that the prosecution has firmly established the circumstances that it was the accused and none else who had taken away Kirti from her matrimonial home on the pretext that they would take the darshan of Goddess Mangladevi as she could not bear a child; that there was motive attributed to the accused because it has been established that an amount of Rs.7,000/- was given to him long back by the husband of the deceased and though demanded he did not return the same; that the accused had taken away Kirti with him who disclosed to her mother Vatsalabai before leaving the matrimonial home that she would purchase television from the money which would be paid by the accused; that the deceased was last seen in the company of the accused on 30.12.1997 by Vatsalabai and Panchfulabai (P.W.1); that the accused had showed the well wherein he had thrown the bag of Kirti in which the articles belonging to Kirti were found and those articles were discovered in consequence of the information furnished by the accused on 17.1.1998; that the accused had sold the golden necklace to the goldsmith Manohar who has recorded the entry regarding the same in the register kept at this shop and these facts were discovered in consequence of the information furnished by the accused on 1.1.1998.

9. He contended that the aforesaid circumstances have been firmly established by the prosecution and there is no reason for this Court to interfere into the findings recorded by the learned Additional Sessions Judge and the appeal may kindly be dismissed.

10. This Court has given thoughtful consideration to the contentions canvassed by the learned counsel for the respective parties. It is not in dispute that the entire case of prosecution rests on circumstantial evidence in the sense that nobody from the prosecution witness claims to have seen the accused while committing the murder of Kirti. The law as regards the appreciation of evidence has been almost settled by a series of decision of the Supreme Court to which a reference, in brief, will have to be made particularly in the case of *Sharad Birdhichand Sarda v. State of Maharashtra*, Vol.86,1984 B.L.R.536, wherein it has been observed as under:

"The prosecution must stand or fall on its own and it cannot derive any strength from the weakness of the defence. The five principles of the proof of a case based on circumstantial evidence are (i) the circumstances from which the conclusion of guilt is to be drawn be fully established; (ii) 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; (iii) the circumstances should be of a conclusive nature and tendency; (iv) the circumstances should exclude every possible hypothesis except the one to be proved; (v) 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.

A case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction.

The Hon'ble apex court has consistently laid down the law that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established, that those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused and the circumstances taken cumulative should form a chain to complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation with that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should also be inconsistent with his innocence. If the three conditions which are necessary to be satisfied before circumstantial evidence can be made the basis for conviction have not been fulfilled, the accused cannot be convicted. There may be suspicion against the accused, but suspicion alone cannot take place of evidence. Conviction based on circumstantial evidence can be sustained, if it is such as to be conclusive of the guilt of the accused and incapable of explanation of any hypothesis consistent with the innocence of the accused. Before a person can be found guilty with reference to mere circumstantial evidence, each of the circumstances relied on must be clearly established and the proved circumstances taken together must be such as reasonably to exclude the probability of innocence."

11. We have heard the learned counsel for the parties, perused the evidence of the prosecution witnesses and also gone through the judgment of the trial Court. At the outset it may be stated that it is not in dispute that the dead body of unknown female was found by one Dilip Kale in the nullah situated in his field and he had furnished information in that behalf to the police, on the basis of which accidental death case was registered initially. The dead body was sent to the medical officer for the purpose of post-mortem examination and the post-mortem report (Ex.71) which is an admitted document would show the following injuries mentioned in col.No. 17.

- (1) Left hand fingers destroyed due to burn,
- (2) Left foot below ankle destroyed due to burn,
- (3) Great toe of right foot destroyed due to burn;

- (4) Bone of left lower extremity femur, tibia, fibula completely exposed due to severe burn of muscles,
- (5) Bones of right leg tibia and fibula exposed due to severe burn,
- (6) Muscles of right thigh burned,
- (7) Abdomen completely destroyed due to severe burn and organs in abdomen and pelvis completely destroyed due to burn,
- (8) Head, neck, face completely burned.

12. The medical officer has mentioned in the post-mortem report that the above injuries were post-mortem and he opined that the cause of death was asphyxia due to obstruction in airway passage due to cloth piece in mouth and pressure on nostrils.

13. What is significant to note is that the post-mortem was effected on the dead body of an unknown female and thereafter during the course of investigation it was found that the dead body was of Kirti, but fact remains that the dead body was not identified for a long time - say for a period of three-four days. The learned Additional Sessions Judge recorded the finding that the said dead body of unknown female was that of Kirti and besides he also held that the conviction for an offence does not necessarily depend upon the corpus delicti being found and that this is a case wherein reliable circumstantial evidence would point towards the guilt of the accused, on reappraisal of evidence, at the outset it may be stated that we do not uphold the findings of the learned Additional Sessions Judge and this is a case wherein the prosecution has relied on the story circumstances and there is a missing link in the chain of circumstances.

14. The first circumstance is that Kirti is said to have been last seen in the company of the accused. In this context the evidence of Babasaheb (P.W.2) - the husband of the deceased and Vatsalabai (P.W.5) - the mother of the deceased would indicate that on 30.12.1997 Kirti and her husband were present and Vatsalabai had come to their house and took lunch at about 12 O'clock in the noon. At that time Babasaheb went to the school and the accused had come to their home and Kirti told that her uncle, i.e. the accused, had come to take her and she was going as it was the birthday of son of her elder uncle and so saying Kirti left with the accused.

15. The evidence of Panchfulabai (P.W.1) would reveal that she is distantly related with the accused and that about two years ago in winter season at about 6.00 or 6.30 p.m. she herself and her daughter were present at Ashtoli and at that time the accused along with one married girl aged about 20 to 22 years had come to her house and the accused said that the girl who was accompanying him was his niece and they had come in the village to take the blessings of Goddess. Mangladevi, upon which this witness told that Mangaladevi was not in the village. This witness further stated that thereafter the accused and that lady left her house and proceeded on foot up to the temple. The evidence of this witness

would reveal that after two or three days from the discussion in the village she came to know that one girl was murdered in Jalnapur Nullah and Article A which is the photograph of Kirti is of the same girl.

16. It would reveal that the articles which were found to have been discovered in consequence of the information furnished by the accused on 17.1.1998 from the well as per memorandum panchanama (Ex.45) and discovery panchanama (Ex.45-A) were not shown to any of the witnesses and there is a missing link so far as the discovery of the articles belonging to the deceased is concerned.

16. Thus the glaring infirmities brought on record are that the partly burnt clothes of the deceased which were comprised of partly blouse piece, partly burnt piece of brassier, partly burnt saree and partly burnt petticoat were not shown to any of the prosecution witnesses including the husband and mother of the deceased. The clothes of the deceased from the bag comprising of one blouse, one brassier and a knicker, are said to have been discovered in consequence of the information furnished by the accused, were not shown and got identified through the prosecution witnesses and there was also a delay in making the discovery of these articles.

17. Though the accused had furnished information that he had sold the golden necklace to the goldsmith Manohar and he was ready to point out the said shop, the evidence of Manohar would show that the accused is the same person who had sold the golden necklace to him and as per the entry recorded in the register kept at the shop of Manohar the signature of the accused was obtained on the receipt, but the signature was not sent to the handwriting expert to show that it was drawn by the accused in fake name Rajesh Hiwase. All these infirmities create a doubt regarding the genuineness of the discoveries which are made after considerable delay after the arrest of the accused, for which the prosecution did not furnish any explanation.

19. The learned Additional Sessions Judge has rightly disbelieved the evidence in relation to the discovery of spot which is said to have been made on 8.1.1998 in consequence of the information furnished by the accused while he was in police custody because the spot of incident was already known to police and it appears that the P.S.I.Gopinath has made a farcical discovery of the spot of incident.

20. On appreciation of evidence of Panchfula (P.W.1), Babasaheb (P.W.2) and Vatsalabai (P.W.5) it would reveal that though Kirti had left along with the accused on 30.12.1997, there is no satisfactory evidence to show that the deceased was last seen in the company of the accused soon before her murder. The dead body of unknown female was found on 2.1.1998 and, therefore, the evidence in relation to the last seen is not sufficient to jump at the conclusion that the dead body of the unknown female was that of Kirti. Thus, in this situation, we have our own doubts as to whether it was the same lady who was taken away from her matrimonial home by the accused, who was murdered by him in the nullah of Jalnapur.

21. The last circumstance on which heavy reliance is placed by the prosecution is regarding the sale of Mangalsutra of deceased Kirti to the goldsmith would reveal that on 1.1.1998 the accused had sold one golden necklace in the fake name by giving his name as Rajesh Hiwase. The goldsmith had recorded the entry in the register maintained by him at his shop. He had also issued a receipt to the accused and obtained his signature on the said receipt (Ex.36). As per the entry recorded at Sr.No. 171 (Ex.35), it appears that Rajesh Hiwase had sold one golden necklace for which a receipt was given and the his signature was also obtained on the said receipt. What is significant to note is that the Investigating Officer did not send this receipt (Ex.36) to the handwriting expert to show that the signature drawn in the name of Rajesh Hiwase on this receipt is in the handwriting of the accused. This glaring infirmity brought on record in the prosecution case would create a doubt regarding the identity of the golden necklace which is said to have been sold by the accused to goldsmith, in view of the circumstance that the goldsmith had melted the said necklace and he would only produce a ball made up of gold before the police in consequence of the information furnished by the accused, and in such a situation the discovery evidence in relation to the necklace which is said to have been made on 19.1.1998 is not of any assistance to the prosecution.

22. Therefore, this is a case wherein there is no evidence to show that the accused had removed the golden necklace from the person of Kirti after murdering her and that it was he and none else who has committed her murder and tried to destroy her dead body by pouring kerosene and setting it on fire. Thus the missing link in the chain of circumstances would lead to the inference that the circumstances on which reliance is placed by the prosecution is not consistent with the hypothesis of guilt except the one to be proved. Consequently, the chain of circumstances is not so complete as to leave any reasonable ground for the conclusion consistent with the innocence of the accused. The circumstances brought on record create suspicion against the accused because it is he who had taken away Kirti from her matrimonial home with him and he did not furnish any explanation as to when he parted her company. But suspicion howsoever grave cannot take the place of proof and in such circumstances the accused would be entitled to get benefit of doubt.

23. In the result, we are of the considered opinion that the circumstances brought on record are not sufficient to lay the guilt at the doors of the accused beyond all reasonable doubt and consequently we acquit the accused of the offence for which he was charged by setting aside the impugned judgment and order of conviction. The appeal is accordingly allowed. The appellant accused be set at liberty forthwith, if not required in any other offence.