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In the Bombay High Court

Case No : Criminal Appeal No. 31 of 2014

Nilesh @ Nitin s/o Keshavrao Kanhere — APPELLANT

Vs

State of Maharashtra — RESPONDENT

Date of Decision : 01-07-2016

Acts Referred:

Citation : (2017) ALLMRCri 572 : (2016) 3 BomCR(Cri) 306 : (2016) 5 MhLJCrl 454

Hon'ble Judges : B.R. Gavai and V.M. Deshpande, JJ.

Bench : Division Bench

Advocate : Mr. J.M. Gandhi, Advocate, for the Appellant; Mr. M.K. Pathan, APP, for the Respondent

Final Decision : Allowed

Judgement

V.M. Deshpande, J. (Oral) - Being aggrieved by the judgment and order of conviction passed by learned Additional Sessions Judge ? 6, Nagpur, dated 31st of December, 2013, in Session Trial No. 135 of 2013, whereby the appellant was convicted for the offence punishable under Section 302 of the Indian Penal Code and was directed to suffer imprisonment for life and to pay a fine of Rs. 1000/- and in default of payment of fine to suffer rigorous imprisonment for one month.

2. Such of the facts which are necessary for the decision of this appeal are stated as under :

Sau. Seeta Charpe is the first informant. Deceased is her husband. His name was Deepak. Appellant is the real brother of first informant Seeta.

3. The law was set into motion by Seeta Charpe by lodging her oral report with Police Station Jalalkheda. Her oral report is at Exh.12. In her report she states that she works as a Nurse at Lata Mangeshkar Hospital, MIDC, Hingna. She is having two brothers; one appellant and other Kapil. Deceased Deepak used to reside as a neighbour prior to her marriage with him at Jalalkheda. There was a love affair of the first informant with Deepak. Therefore, they got married

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themselves at Someshwar Temple at Jalalkheda on 12th of August, 2012.

The First Information Report further states that she married with deceased Deepak against the wish of her family members. Appellant Nilesh used to extent threats to the parents of deceased Deepak. This fact was made known to the deceased by his parents which was communicated by deceased to the first informant.

The appellant''s report further states that on 27th of November, 2012 the first informant and Deepak came on motorcycle from Nagpur to Jalalkheda in connection with the registration of their marriage. They were required to swear an affidavit therefore they came to Tahsil office at Jalalkheda. However, Tahsildar was not present. Therefore, they went near Bar of one Jaiswal at Bharsingi. There, deceased was talking with one Abhay Dandare. After some time, at 2.30, they again came to tahsil office, however, that time also Tahsildar was not present. Therefore, the first informant sat in the B.R. Stationery shop. It is further stated in the First Information Report that at 3 O''clock, she saw the appellant and the deceased proceeding on the motorcycle of the deceased on the road of Umath ? Thadipavani.

It is further stated in the First Information Report that even after three hours her husband did not return therefore, she came to the Police Station and informed the said fact. Search was made, that time in the burial ground for Muslims at Jalalkheda the dead body of Deepak was found.

4. Sanjay Solanke (PW 4), API was attached to Police Station, Jalalkheda. He received the oral report lodged by Seeta (PW 1). Accordingly, he registered a Crime against the appellant vide Crime No.51 of 2012 for the offence punishable under Section 302 of the Indian Penal Code. He handed over investigation to PW 9 Smita Patil. After being entrusted with the investigation of Crime No.51 of 2012, Smt. Smita Patil (PW 9) Investigating Officer, visited the spot of incident. She prepared spot panchanama (Exh.32). She also prepared inquest panchanama after conducting inquest over the dead body. Inquest panchanama is at Exh.22. She sent dead body to the Hospital for Post Mortem. She arrested appellant on 27th of November, 2012 under arrest panchanama (Exh.38). Clothes of the deceased was seized under seizure panchanama (Exh.33). On 29th of November, 2012 when the appellant was in the police custody, he gave disclosure statement under Section 27 of the Indian Evidence Act by which he agreed to show the place where he threw the motorcycle of the deceased. The said statement is at Exh.18. Accordingly, they reached to the spot and the motorcycle was retrieved from the river. The panchanama to that effect is at Exh.19. Investigating Officer also seized the clothes of the appellant under Seizure Memo Exh.20. All muddemal property were sent to the Chemical Analyzer. Investigating Officer also recorded the statement of the witnesses and after completion of the investigation final report was filed in the Court of Judicial Magistrate (F.C.), Narkhed. Since the offence was exclusively triable by the Court of Session, the learned Magistrate passed committal order and case was

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registered as Session Trial No.135 of 2013. In order to bring home the guilt of the appellant, in all nine witnesses were examined and also reliance was placed on proved documents. The learned Court below found that the prosecution has proved its case beyond reasonable doubt and therefore, passed the impugned judgment and order of conviction.

5. We have heard Shri J.M. Gandhi, the learned counsel for the appellant and Shri Mehroj Pathan, the learned Additional Public Prosecutor for the State. Both of them took us through the record and proceedings and notes of evidence minutely.

It is the submission of the learned counsel for the appellant that the prosecution has utterly failed to prove its case against the appellant beyond reasonable doubt. According to him, the circumstances which are tried to be pressed into service are so feeble and on such weak circumstances the conviction cannot be maintained. He, therefore, submitted that the appeal be allowed.

Per contra, the learned Additional Public Prosecutor submits that the perusal of the impugned judgment and order shows that the view taken by the learned Court below is possible one on the available evidence and therefore, finding of fact may not be disturbed and therefore prays for dismissal of the appeal.

6. Dr. Rajesh Kohar (PW 8) was Medical Officer at Primary Health Center at Jalalkheda. On 28th of November, 2012, dead body of Deepak Charpe was brought to him by police personnel of Police Station Jalalkheda for Post Mortem. Post Mortem was conducted by him and he noticed following external injuries.

(1) He noticed brushing on the right side of the shoulder of the deceased.

(2) Over neck left side redness and whole neck was moving around due to fracture of hyoid bone and cervical bone.

On internal examination, he noticed cervical bone fracture. According to him, cause of death was due to cardio respiratory arrest due to asphyxia due to strangulation. He proved Post Mortem Report and it is at Exh.35. The learned counsel for the appellant tried to make a submission that death of Deepak was not homicidal one but it was accidental one. For making such submission, he tried to point out a statement made in the cross-examination by Dr. Rajesh Kochar (PW 8) that injuries mentioned in column NO.17 may be possible in accident. In our considered view and in the light of spot panchanama, submission of the learned counsel deserves to be rejected.

7. Exh.32 is the spot panchanama. The spot panchanama was drawn on 28th of November, 2012. It shows that the dead body was noticed in the shrubs and trees inside the Muslim Burial Ground. The spot panchanama was drawn in presence of independent panch witness (PW 7) Vishweshwar Gaidhane. If according to the learned counsel for the appellant, deceased lost his life due to an accident then normally his body ought to have been noticed on a road because at the relevant time he was driving motor cycle. In that view of the

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matter and in view of the Post Mortem report, we have no hesitation in our mind that appellant met with homicidal death.

8. The next question is whether the prosecution is successful to bring home the guilt of the appellant beyond reasonable doubt.

9. Admittedly, in the present case, there is no eye witness account. The case of the prosecution is based on circumstantial evidence. The learned Additional Public Prosecutor submits following three circumstances.

(i) enmity with the deceased.

(ii) The appellant was seen lastly in the company of deceased, and

(iii) The recovery of motorcycle at the behest of the appellant.

10. Evidence of Seeta would show that since her husband was not returning, she went to the Police Station at 5.00 p.m. Even that fact is admitted by Sanjay Solanke (PW 4) who has registered the Crime. Curiously enough that when the first informant went to the Police at 5 O''clock that time whereabouts of her husband were not knowing to her. She must have been in a worried condition. However, no missing report was lodged or registered by the Police. This fact is important because printed FIR (Exh.16) shows that the FIR was registered at 23.00 hrs. No explanation whatsoever is coming on record as to why the First Information Report is lodged in the late hours of night. This assumes importance because first informant Seeta has stated in her evidence that she cannot state the time when the dead body of Deepak was found. From the evidence of PW 4 Sanjay Solanke dead body was found at 9 p.m and still the report was lodged at 11.30 pm.

11. Insofar as motive is concerned, as per the evidence of Seeta, when she used to reside at Jalalkheda along with her parents prior to her marriage, she was having love relations with Deepak and they married on 12th of August, 2012. The marriage was performed against the wish of the appellant and her parents. According to the First Information Report and from the evidence on record of Seeta, threats were extended by the appellant to her in-laws. The first information report as well as his evidence is completely silent that any threats were given to her parents-in-law of Seeta are not examined by the prosecution to prove the said aspects.

12. Further, it is brought on record in the cross-examination that she is not on talking term with her parents and even she has not visited her parental house after the death of her younger brother. In view of this, we are not much impressed with the submission of the learned Additional Public Prosecutor insofar as motive is concerned.

13. The second circumstance, according to prosecution, is that the appellant was seen lastly in the company of the deceased. It is not in dispute that after the marriage Seeta started residing at Digdoh, Nagpur. The appellant used to reside

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with his family at Jalalkheda.

It is not the case of the prosecution that after the marriage, PW 1 Seeta was having any telephonic talk either with the parents or the present appellant. On the contrary, the evidence as brought on record would establish that PW 1 Seeta must not be on talking term with her parents or the appellant.

14. According to the evidence of PW 1 Seeta, on 27th of November, 2012 she along with her husband Deepak came to Jalalkheda from Nagpur on motorcycle for registration of marriage. The motorcycle was owned by PW 2 Dhananjay Waghade who has testified that he has handed over his motor cycle to Deepak for proceeding to Jalalkheda.

According to Seeta, when she along with her husband reached to tahsil office at Jalalkheda at 11 a.m. that time Tahsildar was not present and therefore, the concerned clerk called them at 2 p.m. Visit for Jalalkheda, according to the prosecution witness, was for procuring Certificate of Registration of their marriage. After being asked by the clerk of the Tahsildar to come at 2 p.m., the couple were chitchatting with Abhay Dandare near ''Jaiswal Bar''. Said Abhay Dandare is the friend of deceased Deepak. At 2.30 p.m. again they went to tahsil office, that time also Tahsildar was not present. Therefore, they sat near ''B.R. Shop''. Thereafter, according to the evidence of PW 1 Seeta, deceased Deepak went to Gram Panchayat by informing her that he will return after ten minutes. According to Seeta, that time she noticed that her husband deceased Deepak and appellant her brother, were proceeding by motorcycle. This is the evidence insofar as the ''last seen'' theory.

15. One cannot forget the fact that the marriage between Seeta and Deepak was performed against the wish of appellant and his other family members. Not only that, it is the prosecution case that threats were extended to kill Deepak by the appellant.

Further, it is an admitted position that Deepak and PW 1 Seeta came to Jalalkheda from Nagpur. There is nothing available on record to show that present appellant was knowing about the visit of Deepak and his sister Seeta at Jalalkheda. There is no evidence brought on record to show the presence of appellant near the spot from where he along with the deceased proceeded on the motorcycle. In absence of any connecting evidence it would be only by way of imagination one could reach that the appellant was knowing about the visit of deceased along with his wife at Jalalkheda.

16. Further, even according to the evidence of PW 1 Seeta, the appellant was a pillion rider. It is brought on record that the place where the appellant rode as a pillion rider was congested and busy place and Seeta was at about 100 ft. distance therefore, in our view, it would be very difficult for the said prosecution witness to see that who was pillion rider. Further, it is to be noted that at about 3 p.m. deceased Deepak left the place. As per the evidence of PW 1 Seeta she made a wait for about 3 hours and thereafter she made a phone-call to Abhay

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Dandare and Umesh Banait. That evidence, therefore, postulates that phone-call to Abhay Dandare and Umesh Banait must have been made around 5.30 to 6.00 O''clock. Abhay Dandare is not examined by the prosecution. Umesh Banait is examined as prosecution witness No.3. In his evidence he has stated that on the day of incident at 3.15 p.m. he received a phone-call from Abhay Dandare and informed him that deceased Deepak and appellant both went towards Umtha road by motorcycle. Umesh Banait is not supporting PW 1 Seeta that he received any phone-call from her. On the contrary, he claims that he received phone-call at 3.15 pm from Abhay Dandare. There was no reason for Abhay Dandare to make such a phone-call. Further, whether really he received the phone call from Abhay Dandare is remained to be proved, in view of not examination of Abhay Dandare and not availability of any Call Detail Report (C.D.R.) on record.

17. The recovery of the motorcycle at the behest of the appellant appears to be from the open place. It was not in the exclusive knowledge and control of the appellant. Therefore, much importance cannot be attached to the same. Further, the C.A. report shows that no bloods were detected on the clothes of appellant which were seized and which were sent to the Chemical Analyser.

18. In view of the reevaluation of prosecution case, we are of the view that the chain of circumstances is not complete. The prosecution has failed to prove each piece of the chain independently by adducing the reliable and trustworthy evidence. Therefore, we are of the view that the appeal needs to be allowed. Hence, we pass the following order.

ORDER

1. The Criminal Appeal is allowed.

2. The judgment and order of conviction and sentence dated 31st of December, 2013 passed by the learned Additional Sessions Judge 6, Nagpur in Session Trial No.135 of 2013 is quashed and set aside. The appellant is acquitted of the offence for which he was charged and convicted.

3. The appellant be released forthwith if not required in any other case.

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