
(1994) 06 BOM CK 0066
In the Bombay High Court
Case No : Criminal Appeal No. 132 of 1992

Parmeshwar Sopan Gaikwad

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 10-06-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 313
Evidence Act, 1872 — Section 106, 3, 45, 60, 61
Penal Code, 1860 (IPC) — Section 302

Citation : (1995) 1 BomCR 420 : (1994) 96 BOMLR 198

Hon'ble Judges : Vishnu Sahai, J;M.S. Rane, J

Bench : Division Bench

Advocate : Sumedha Rao, for the Appellant; Nallawade, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Vishnu Sahai, J.—The appellant has preferred this appeal against his conviction u/s 302 I.P.C. and sentence of imprisonment for life and fine of Rs. 100/- and fifteen days R.I. in default imposed there under. The aforesaid order was passed by Shri V.L. Sawaleshwarkar, IIIrd Additional Sessions Judge, Thane on 9-9-1991 in Sessions Case No. 421 of 1990.

2. The prosecution case in brief as unfolded from the recitals made in the First Information Report and in the deposition of the witnesses recorded in the trial Court, runs as under:--

The informant P.W. 2 Balu Kamble is the younger brother of the deceased Mangala. According to the prosecution about 8 to 9 years prior to the date of incident the deceased Mangala had been married to the appellant. The evidence is that her house was situated at a distance of about 50 ft. from that of P.W. 2 Balu Kamble and his brother Bappa (P.W. 3) and their family members. According to the prosecution, appellant who was a drunkard in a drunken state used to often beat the deceased and also used to threaten her that he would throw her

into the Khadan (ditch). This information was given to P.W. 2 Balu Kamble by the deceased.

On 1-6-1990 at about 7 p.m. when the informant returned from his work his younger brother Bappa Kamble (P.W. 3) came running and met him on the way to his house and informed him that the appellant was quarreling with Mangala pulling her hair and dragging her towards the Khadan. On receiving this information, P.W. 2 Balu and P.W. 3 Bappa went towards the house of the accused and while they were on the way they met one Manik Sambhaji Chandan Shive (P.W. 4). P.W. 4 Manik is alleged to have told them that Mangala had been thrown from the hillock, (the evidence is that the hillock is near the Khadan), into the Khadan by the appellant. After receiving this information the informant, his brother Bappa, his father and Manik P.W. 4 went towards the Khadan and on reaching there saw Mangala lying dead in it. She had injuries on her head and other parts of the body.

3. Thereafter the informant proceeded to Police Station Bhiwandi where he lodged the F.I.R. on the same day (1-6-1990 at 7.30 p.m.). On the basis of the F.I.R. a case, being Crime No. 134/90 u/s 302 read with 34 I.P.C. was registered by P.W. 5 P.S.I. Shashikant Sitaram Choudhari of Police Station Bhiwandi. The F.I.R. is Exhibit 29.

4. On the date of the incident itself the appellant was arrested and the panchanama pertaining to his arrest was prepared the same day between 8.15. and 8.30 p.m. at Police Station Bhiwandi. The spot panchanama was prepared between 7 a.m. and 8.30 a.m. on 2-6-1990 by P.W. 6 P.I. Subhashi Hiranman Mohekar.

5. The post mortem examination on the dead body of Smt. Mangala was performed on 2-6-1990 between 1 p.m. to 1.45 p.m. by P.W. 1 Dr. Madhukar Ramji Patil and Dr. A.R. Cavathe. The autopsy report reveals the following ante-mortem injuries on the body of the deceased :

1. C.L.W. head in parietal area on Lt. side 6 cm. x 2 cm. bone deep. Depression of bone in the centre of wound.

2. C.L.W. on Lt. superior iliac crest in the middle 2 cm. x 2 cm. x muscle deep.

3. Multiple abrasions over (i) Rt. elbow

(ii) Rt. wrist (iii) Lt. elbow

(iv) Lt. wrist,

(v) Rt. knee, (vi) Lt. knee,

(vii) Forehead.

The internal examination revealed that there was depressed fracture in the left parietal area of the dimensions of 3 cm. x 2 cm. The death, according to the doctor was as a result of cardio respiratory failure due to shock, due to head

injury and haemorrhage. According to doctor the injuries of the deceased could have been caused by her coming into contact with rough and blunt object, like stone. Doctor Madhukar Patil also found that the aforesaid injuries of the deceased were sufficient in the ordinary course of nature to cause death.

6. The charge sheet in the instant case was submitted by P.W. 6 P.I. Subhash Mohekar. In the usual course the case was committed to the Court of Sessions where the appellant was charged u/s 302 I.P.C. The appellant pleaded not guilty to the charge.

7. The defence of the appellant was that of denial and alibi. In his statement u/s 313 Cr.P.C. the appellant stated that on the date of the incident he was doing Hamali (labourer's work) at Municipal Naka, that on that at about 7 p.m. he heard that a lady had collapsed in a ditch near his house and therefore, he proceeded towards his house and while on way he was accosted by the police which took him to the ditch and concocted a false case against him. The appellant also denied having any quarrel with the deceased. He also denied that he either pulled her or dragged her towards the ditch. He denied having thrown her into the ditch and pleaded innocence in the matter.

From the side of the defence a suggestion was given to the eye-witnesses that by accident the deceased had fallen into the Khadan (ditch).

8. During the trial in all six witnesses were examined. Out of them three, Balu (P.W. 2) is the informant, Bappa (P.W. 3) and Manik (P.W. 4) are witnesses of fact and out of the remaining three witnesses P.W. 1 Dr. Madhukar Patil is the autopsy surgeon, P.S.O. Shashikant Choudhari (P.W. 5) and P.I. Subhash Mohekar (P.W. 6) are the investigating officers.

9. The learned Session Judge believed the evidence adduced by the prosecution and passed the impugned order against which the present appeal has been filed.

10. We have heard Mrs. Sumedha Rao, learned Counsel for the appellant and Mr. Nallawade Additional Public Prosecutor for the State at considerable length. We have gone through the depositions of the prosecution witnesses and examined the various exhibits which have been proved by the prosecution to substantiate its case. We have also perused the impugned judgment. After giving also anxious consideration to the matter we are constrained to hold that this appeal is devoid of substance and consequently must fail. In reaching this conclusion, the reasons enumerated below, have primarily weighed with us:

Firstly we find that the F.I.R. of the incident was lodged very promptly, that is within half an hour of the incident taking place. The incident is alleged to have taken place at about 7 p.m. and the F.I.R. was lodged at 7.30 p.m. by P.W. 2 Balu, the younger brother of the deceased. The importance of a prompt F.I.R. cannot be over emphasised. Promptness in the lodging of the F.I.R. eliminates possibility of the informant being tutored and false implication of the accused. In the F.I.R. we find that the accused is nominated. We also find that in it, it has

been mentioned that it was Manik (P.W. 4) who had told the informant and his brother P.W. 3 Bappa that it was the appellant who had pushed the deceased from a hillock into the ditch. It is worth nothing that the informant is the real brother in law of the appellant and consequently there was no question of his falsely nominating the appellant in the F.I.R.

The second factor which we have taken into account is that there is conformity between the ocular account of the incident and the medical evidence. The ocular account as unfolded by (P.W. 4 Manik) is that the appellant, from a hillock pushed the deceased into a ditch and the medical evidence as we have seen earlier is to the effect that the ante mortem injuries of the deceased could have been caused by her coming into contact with a rough and blunt object like stone.

The third circumstance which goes against the appellant is that all the three witnesses viz. P.W. 2 Balu, P.W. 3 Bappa and P.W. 4 Manik had no reason to falsely implicate the appellant. P.W. 2 Balu and P.W. 3 Bappa were the brothers-in-law of the appellant and P.W. 4 Manik was a wholly independent witness. These witnesses were also natural witnesses. The evidence shows that on 1-6-1990 at about 7 p.m. when the informant came to his house which was about 50 ft. away from the house of the appellant his brother Bappa came running and informed him that the appellant caught hold of the hair of the deceased and was dragging her towards the ditch. He also told him that the appellant was quarrelling with the deceased. When the informant and Bappa went towards the house of the appellant on the way they met Manik (P.W. 4), who informed them that the appellant from the hillock had pushed his wife (the deceased Mangala) into a ditch. The evidence is that Manik also resides in close proximity of the house of P.W. 2 Balu and P.W. 3 Bappa. We may mention that Manik (P.W. 4) has witnessed the actual pushing of the deceased into the ditch which was 150 ft. in depth and was rocky in nature. P.W. 3 Bappa only witnessed the appellant quarreling with the deceased, pulling her hair and taking her towards the ditch. It was this information which was given by P.W. 3 Bappa to P.W. 2 Balu, the informant. As mentioned earlier none of these witnesses had any axe to grind against the appellant or any score to settle with him. All of them were natural and probable witnesses.

The fourth circumstance which has weighed with us is that the prosecution story is also in tune with probabilities. The evidence is that the hillock from which the appellant is alleged to have pushed the deceased is close to his house.

The last circumstance which has weighed with us is that there was a history of sour relationship between the appellant and the deceased. The appellant who is a drunkard even in the past used to beat the deceased. This was told by the deceased to P.W. 2 Balu.

11. Mrs. Rao, the learned Counsel for the appellant argued this matter with great vehemence and tenacity. Principally, she made three submissions.

12. Her first submission is that at the time of the incident, the appellant was not

present on the place of incident and this defence of the appellant has been wrongly rejected by the learned trial Judge. Mrs. Rao submitted that there is evidence on record to show that the appellant is a mathadi worker and as has been stated by him in his statement u/s 313 Cr.P.C. on the date and time of the incident he was doing hamali work at the Municipal Naka. That being so, Mrs. Rao submits, there was no question of the appellant causing homicidal death of the deceased, which is alleged to have occurred at about 7 p.m. on 1-6-1990.

We regret that we cannot persuade ourselves to accept this contention of Mrs. Rao. This defence of alibi which has been pleaded by the appellant has not been proved by him, as enjoined upon him by section 106 of the Evidence Act. Section 106 of the Evidence Act, reads thus :

"106. Burden of proving fact within knowledge. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustration

(a) When a person does an act with some intention other than that which, the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."

In our opinion, the appellant has not been able to discharge this statutory burden enjoined by section 106 of the Evidence Act. Neither any defence witness has been examined on his behalf to show that he was working in Municipal Naka Bhiwandi at the aforesaid time nor any documentary evidence has been adduced by him and proved which would establish this defence of the appellant. We further find that no suggestion was given to any of the witnesses that at the time of the incident, the appellant was not at the place of incident but was doing hamali work at the Municipal Naka. The solitary mention of such a defence in his statement u/s 313 Cr.P.C. would not tantamount to the accused discharging burden upon him as enjoined by section 106 of the Evidence Act.

In view of the aforesaid reasons, the first contention of Mrs. Rao fails.

13. The second contention of Mrs. Rao is that presence of blood on the shirt of the appellant militates against the prosecution story and shows that there is substance in the defence of the appellant that while on way to his house from Municipal Naka, on receiving news about the death of a lady, police accosted him. Mrs. Rao submits that the police must have beaten the appellant and consequently there was blood on the front part of his shirt. We regret that we cannot accede to this contention of Mrs. Rao either. In the first instance, we find that in his statement u/s 313 Cr.P.C. the appellant has not stated that he was beaten by the police. The aforesaid contention of Mrs. Rao has been answered by the appellant himself in his statement u/s 313 Cr.P.C. In the aforesaid statement, when the appellant was questioned about presence of blood of AB group on his

shirt, he replied "It may have happened when I was made to shift her from Khadan. Report is false".

14. The third and last contention of Mrs. Rao is that it is a mystery as to how on the basis of the F.I.R. a case u/s 302 read with 34 I.P.C. was registered because in the instant case, as is clear from the recitals of the F.I.R. the appellant was the sole accused. This obviously happened on account of carelessness of P.W. 5 P.S.I. Shashikant Sitaram Choudhari who registered the case on the basis of the F.I.R. No capital can be made from this circumstance.

15. No other point was pressed before us by Mrs. Rao.

16. For the reasons stated above we find no merit in this appeal and the same is accordingly dismissed. The conviction and sentence of the appellant is confirmed. The appellant is in jail. He shall continue to remain there to serve out his sentence. Office shall send a copy of our judgment to the appellant, through the Superintendent of the jail, where the appellant is detained.