

(2016) 06 BOM CK 0193
In the Bombay High Court
Case No : Cri. A. No. 603 of 2013

Pradeep S/o Dinbandhu Chakaladhar

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 28-06-2016

Acts Referred:

Evidence Act, 1872 — Section 106, Section 25, Section 27, Section 3, Section 8
Penal Code, 1860 (IPC) — Section 201, Section 302

Citation : (2016) 5 MhLJCrI 647

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

Bench : Division Bench

Advocate : R.M. Daga, Advocate, for the Appellant; T.A. Mirza, A.P.P, for the Respondent

Final Decision : Dismissed

Judgement

V.M. Deshpande, J.—The appellant is questioning his conviction and consequent sentence imposed upon him by the learned Sessions Judge, Wardha dated 19-9-2013 in Sessions Trial No. 6/2012 by which he is convicted for the offence punishable under section 302 of the Indian Penal Code and is directed to suffer imprisonment for life and to pay a fine of Rs. 1,000/- in default to suffer rigorous imprisonment for one month. He is also convicted for the offence punishable under section 201 of the Indian Penal Code and on that count, is directed to suffer rigorous imprisonment for two years and to pay a fine of Rs. 1,000/- in default to suffer rigorous imprisonment for one month, the appellant is before this Court.

2. We have heard Mr. R.M. Daga, learned counsel for the appellant and Mr. T.A. Mirza, learned A.P.P. for the State. Both of them took us through in detailed, notes of evidence and record and proceedings of the sessions trial.

According to the learned counsel for the appellant, the present case is based on the circumstantial evidence. Therefore, the prosecution was obliged to prove each circumstance leading to the guilt of the appellant beyond reasonable doubt.

He submitted that the prosecution has utterly failed to prove his presence at the spot at the time proximate to the occurrence of the crime. He submitted that the learned Judge of the Court below has wrongly convicted the appellant by taking recourse to the provisions of section 106 of the Indian Evidence Act. He therefore submitted that the appeal may be allowed.

Per contra, it is submitted by the learned A.P.P. that though the case is based on circumstantial evidence, the appellant being resident of that house, his presence in the proximity of the occurrence of the incident can be presumed. He, therefore, submitted that the learned Judge of the Court below was right in convicting the appellant.

3. The appellant faced the charge that in the intervening night of 25-9-2011 and 26-9-2011, at the house of his landlord Natthuji Shrawan Khairkar at village Mandva, Dist. Wardha, he has committed murder of one Rajlaxmi who was residing with him as wife by throttling and smothering and thereby he has committed an offence punishable under section 302 of the Indian Penal Code. He was also charged for screening himself from the legal punishment. He hid her dead body in the latrine of the house and thereby committed an offence punishable under section 201 of the Indian Penal Code.

4. Dr. Indrajit Khandekar (PW1) received the dead body on 26-9-2011 through Police Station, Sevagram. The dead body was of a woman and her identity was given as Nilima Mandal. He conducted the post mortem on the dead body. He found 13 injuries, which are as under :

"1. A contusion is present on lower border of left side of mandible of size 4 cm X 1.3 cm. horizontal in direction, reddish in colour. It is 3 cm lateral to the midpoint.

2. Contusion of size 2.3 cm X 1.1 cm with crescentic abrasion on upper side involving left maxillary area. Upper end is 1.3 cm. below the lateral to left nostril. Oblique in direction upper end on medial side. Reddish in colour.

3. Contusion with crescentic abrasions at places present vertically over midline of the neck, size 5 cm X 4.8 cm. Upper border is 3 cm below the chin Reddish in colour.

4. Multiple crescentic marks (4 in No.) (abrasion) involving right side of the neck (middle portion) which is 3.5 cm. away from the mid line. Reddish in colour.

5. On right side of neck just lateral to the windpipe (around 1 cm) on its upper portion, there is contusion of size 5 cm X 2 cm, vertical in direction. Reddish in colour.

6. Contusion of size 4.5 cm X 3 cm is present involving posterior ?rd of the lower border of the right side of mandible and right angle of the mandible, Horizontal in direction. Reddish in colour.

7. Both angle of Mouth shows contusion involving the surrounding area of size around 1-2 cm which is confirmed by giving incision to it. On incision

subcutaneous tissue shows infiltration of blood. Reddish in colour. Consistent with application of force to mouth.

8. Middle portion of left upper limb, dorsal aspect shows contusion of size around 4 cm X 3 cm. suggestive of application of force. Reddish in colour.

9. 2nd small toe of right leg shows abrasion of size 0.5 cm X 0.5 cm reddish colour.

10. Left knee on lateral aspect shows 3 abraded contusion of size ranging from 0.8 cm X 0.4 cm to 0.6 cm X 0.3 cm. Reddish in colour.

11. Left foot, lower dorsum aspect, shows 3 abrasions of size around 1 cm X 0.3 cm. each. Reddish in colours.

12. Three imprint contusion are present on the anterior aspect of lower half of the right thigh slightly oblique in direction, upper ends are towards left side. Size are 4.6 cm X 0.7 cm, 5 cm X 1 cm, 4 cm X 1.2 cm. margins are blurred. Bluish in colour.

13. On anterior aspect of right leg (sheen) three contusion marks present on the middle portion of the sheen, size around 1.5 cm X 1 cm each. Margins are blurred. Bluish in colour."

According to the autopsy surgeon, the cause of death was asphyxia (lack of oxygen to the brain) due to constriction of neck and mouth due to throttling and smothering. In view of the evidence of Dr. Khandekar and post mortem report Exh.18, there cannot be any doubt about the nature of death.

5. The question i.e. is posed before this Court in this appeal is whether the prosecution has successfully established beyond the reasonable doubt that it is the appellant, who is responsible for the homicidal death of the deceased.

Nobody has seen who has committed the murder. The case is fully based on the circumstantial evidence. According to Devashish Bairagi (PW8) who is resident of Damodarpur, Dist. Surgaja, Chattisgarh, he has two sisters. One is Nilima, who is alive and one is Rajlaxmi. According to his evidence before 1? years, Rajlaxmi informed him that she has married with one Pijush Mandal. As per the evidence of Radhabai Khairkar (PW3), in whose house the appellant was residing as tenant, the name of the wife of the appellant was Nilima. The evidence of Devashish (PW8) shows that police brought him to the hospital in Maharashtra. He has identified the dead body as Rajlaxmi.

6. Radhabai Khairkar (PW3), who is landlord of the appellant was not present in the village Mandva on the date of the incident. She along with her husband was at Wardha. One Dr. Parashram Burbure (PW4) intimated her on phone that Nilima, who was residing in her house as a tenant, has expired. Therefore, she along with her husband came to the house.

The dead body was found in the latrine. Dr. Parashram, who is a Medical

Practitioner and who is neighbour of Khairkar family corroborates the fact that the appellant used to reside as a tenant in the house of Khairkar along with his wife. His evidence shows that early morning on 25-9-2011, a person gave him call as "Kakaji, Kakaji" and therefore he opened the door to notice that the appellant was standing in front of his house. According to the evidence of Dr. Parashram, the appellant informed him that his wife has expired in the latrine. Therefore, he took the battery and visited the house and in the light of the torch, he noticed that the dead body of his wife was lying in the latrine. According to his evidence, the other persons of the locality also gathered. Police Patil of the village came there and intimated this fact to the police station.

7. Accidental Death No. 28/2011 under section 174 of the Criminal Procedure Code was registered and the spot panchanama Exh.-34 was drawn on 26-9-2011. Jagdish Hatwar (PW7) a Head Constable has conducted the enquiry in A.D.No. 28/2011 on the basis of the report lodged by appellant at Exh.-45. According to Jagdish Hatwar, during the enquiry of accidental death, the present appellant confessed before him that he has committed murder of his wife. Therefore, Jagdish Hatwar gave written report Exh.-47 to the Police Station Officer, P.S. Kharangana.

Ulhas Bhusari (PW9), Police Station Officer, Kharangana received the report Exh.-47 and on the basis of the same, he registered an offence punishable under section 302 of the Indian Penal Code against the appellant. He himself took the investigation.

During the course of investigation on 27-9-2011, he in presence of pancha witness Purushottam Shende (PW2) seized the cotton smeared with blood from the spot vide seizure memo, Exh.-23. He also seized the clothes of the deceased under seizure memo Exh.-24. Similarly, vide seizure memos, Exh.-25 and 26, he seized the blood samples of the appellant and clothes of the appellant respectively on 28-9-2011. He again prepared spot panchanama on 27-9-2011 vide Exh.-34 in presence of Sudhir Bawne (PW5) and another pancha Mahendra Parimal. As claimed by Ulhas Bhusari, the appellant made statement, Exh.-39 on 29-9-2011 and thereby agreed to show the place where he has concealed the stick. The recovery panchanama is at Exh.-40, showing the recovery of stick at the instance of the appellant.

8. Neither Radhabai, the landlady nor Dr. Parshuram, the neighbour stated that at any point of time they had noticed any discord in between the appellant and the deceased. Their evidence is completely silent on the said aspect. There was no reason for these two independent prosecution witnesses to conceal anything even if there was a discord in between the couple. In that view of the matter, we can safely reach to a conclusion that the couple was leading a happy life.

9. Motive plays an important role in a case solely based on the circumstantial evidence. No doubt that the motive is always in the mind of the perpetrator of the crime, however, it is the duty of the prosecution to establish certain facts and

circumstances by which the Court could reach to a conclusion that there exists a motive in the mind of the perpetrator of the crime for commission of the offence.

10. The inquest panchanama is dated 26-9-2011 and it is at Exh.-35. Similarly, the spot panchanama Exh.-34 is dated 26-9-2011 and it was drawn in presence of Dr. Parashram. The evidence of Dr. Parashram shows that after the police came to the house of the appellant, they prepared the panchanama of latrine and also of his house. This particular fact is put on record in the examination-in-chief of Dr. Parashram. Thus, it is crystal clear that on 26-9-2011 itself, the police have visited the place and after investigation, panchanama was prepared. In that view of the matter, the memorandum statement made by the appellant Exh.-39 under section 27 of the Indian Evidence Act on 28-9-2011 and the consequent recovery of the stick vide recovery panchanama Exh.-28 as claimed by Ulhas Bhusari (PW9), the Investigating officer loses its importance.

11. Crime No. 58 was registered on the basis of the report Exh.-47. This report is given by Jagdish (PW7), who was conducting the accidental death proceeding 28/11. The said report discloses that the present appellant has given confession to Jagdish (PW7) that he has committed murder of his wife and he has given his false name in his report Exh.-45. Thus, the murder is registered mainly on the basis of the confession made by the appellant before a police officer. Confession made by an accused before a police officer is inadmissible in view of section 25 of the Indian Evidence Act.

The learned counsel for the appellant placed reliance on a reported judgment of this Court in *Sunil s/o Latari Khuje v. State of Maharashtra*, 2016(4) Mh.L.J. (Cri.) 150 : 2016 ALL MR (Cri) 2212 to which one of us (Hon'ble Shri Justice B.R. Gavai) is a party, to submit that the appellant cannot be convicted by applying the provisions of section 106 of the Indian Evidence Act.

12. Radhabai Khairkar was at Wardha along with her husband. Therefore, it cannot be expected of her that she will throw any light in respect of the presence of the appellant on 25-9-2011.

Dr. Parashram (PW4) a Medical Practitioner is neighbour. The crime is committed at village Mandva. According to Dr. Parashram on 25-9-2011, he was at his house. His evidence is completely silent about the presence of the appellant in the village on 25-9-2011. Had the appellant been present in his house at village Mandva on 25-9-2011, this fact must not have been missed by Dr. Parashram (PW4) at the time of his evidence before the Court.

13. The prosecution was having bounden duty to prove the physical presence of the appellant at his house on 25-9-2011. It is to be noted that the dead body of the deceased was not found in the house of the appellant. It was found in the latrine, which is not the part and parcel of his house. The said latrine was accessible to everybody else. The appellant was not having exclusive control and domain over the said place. Further, at the time of preparation of the spot panchanamas Exh.-34 and Exh.-37, there is nothing to show that any

incriminating things were noticed and/or found by the police officers to show that inside the house the lady was done to death and thereafter her body was shifted to the latrine to screen himself from legal punishment.

Once on the basis of the evidence, it could be safely said that the prosecution has failed to show the presence of the appellant at the time proximate to the occurrence of the crime, in our view, the provisions of section 106 of the Evidence Act, cannot be applied. The case being based on the circumstantial evidence, each circumstance leading to the guilt of the appellant is required to be proved independently and beyond reasonable doubt. When the prosecution was unable to bring satisfactory evidence in respect the presence of the appellant near the scene of the occurrence, it being a major link in the chain of the circumstances, we have no doubt in our mind to record a finding that the prosecution has failed to prove the guilt of the appellant.

14. The upshot of the above discussion leads us to pass the following order.

ORDER

- (i) Criminal Appeal No. 603/2013 is allowed.
- (ii) The judgment and order dated 19-9-2013 in Sessions Case No. 6/2012 is quashed and set aside.
- (iii) The appellant be set at liberty forthwith, if not required in any other case.