

(2015) 10 BOM CK 0104
In the Bombay High Court
Case No : Criminal Appeal No. 1289 of 2007

Rajeshmukar Kunjbihaari Dwivedi

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 27-10-2015

Acts Referred:

Bombay Police Act, 1951 — Section 135, 37(1)
Criminal Procedure Code, 1973 (CrPC) — Section 209, 313
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 224, 302, 397, 449

Citation : (2015) 4 BomCR(Cri) 783

Hon'ble Judges : V.K. Tahilramani, Actg. C.J., A.S. Gadkari, J.

Bench : Division Bench

Advocate : Nasreen S.K. Ayubi, Appointed Advocate, for the Appellant; R.M. Gadhvi, APP, for the Respondent

Final Decision : Dismissed

Judgement

A.S. Gadkari, J.—The appellant, original accused has challenged the judgment and order dated 31st August 2007 passed by the Additional Sessions Judge, Sessions Court, Greater Mumbai in Sessions Case No. 392 of 2003 thereby convicting the appellant under Section 302 of the Indian Penal Code and sentenced him to suffer life imprisonment and to pay fine of Rs. 500/-. In default of payment of fine to further undergo rigorous imprisonment for one month. The appellant has further been convicted under Section 449 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for 7 years and to pay a fine of Rs. 300/- and in default of payment of fine to further undergo rigorous imprisonment for 15 days. The appellant has also been convicted for the offence punishable under Section 397 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for 7 years. The Trial Court has directed that all the sentences of imprisonment shall run concurrently.

It is to be noted here that the co-accused Michel Chakravarty Patel is absconding since the date of commission of offence and therefore the Trial Court has directed

that the muddemal property which was seized under panchanama (Exhibit 33-A) be handed over to the complainant on a bond that he shall produce the same whenever ordered by the Court. It is to be noted here that the Superintendent of Nashik Central Prison has submitted a report through the learned APP stating that the appellant was released on parole leave on 27.6.2008 for a period of 30 days and since then he has not returned to the jail and is absconding. She further submitted that crime bearing no.00 of 2014 under Section 224 has been registered against the appellant at Nashik Road Police Station.

2. The facts which can be enumerated from the record and are necessary to decide the present appeal can briefly be stated thus:

(i) The date of incident in the present case is 17.3.2003 between 10 p.m. to 11.00 p.m. The deceased Smt. Ramaben Somani aged about 70 years was residing alone at flat no.404, 4th floor, C-Block, Ashish Building, Tirupati Apartments, Bhulabhai Desai road, Mumbai. Her husband expired on 16.7.1999. One Balu Pawar was working as domestic servant for Smt. Ramaben. Son of Smt. Ramaben Mr. Ashok Chandrakant Samani (PW-1) and daughter Ms. Yogini Sahita (PW-4) were residing separately in Mumbai. That on 17.3.2003, between 10 to 11.00 p.m. the neighbour of Smt. Ramaben namely Smt. Anjali Parekh found the door of flat no.404 partly open and she also heard the sound of flowing of water from the tap and therefore she gave a message on phone to the security guard and asked him to verify the same. As there was no response on the phone from Smt. Ramaben, the said neighbour Smt. Anjali Parekh gave phone message to her son Ashok (PW-1).

(ii) That Ashok (PW-1) along with his sister Ms. Yogini Sahita (PW-4) rushed to the flat of Smt. Ramaben. They alongwith security guard Anil Ghuge entered the flat and found Smt. Ramaben lying in pool of blood in the dining hall. They tried to shake Smt. Ramaben, but there was no response. They ascertained the fact that Smt. Ramaben has expired due to injury suffered by her. They thereafter found that the drawer of cupboard of Smt. Ramaben was open and the household articles were lying scattered. They suspected that Smt. Ramaben was murdered for the purpose of theft and the cash amount of Rs. 2 lacs along with other articles were missing from the said house.

(iii) The Police recorded the complaint of Ashok (PW-1) and registered a crime bearing no.63 of 2003 under Sections 397 and 302 of the Indian Penal Code. During the investigation, the police noticed two letters sent by the courier which were lying near the dead body of Smt. Ramaben. The police sent the dead body of Smt. Ramaben for conducting postmortem examination. The Medical Officer informed that the cause of the death Smt. Ramaben was due to "shock due to incised wounds and her death was unnatural". During the investigation, the police found that the appellant who was working with the Navshakti Security Force was on duty upto 14th March 2003 at Tirupati Apartments and subsequently proceeded on leave. Another witness PW-23 namely Dinesh D. Mishra, the supervisor of Navshakti Security Force informed the police that

though the appellant was not on duty on the date of incident i.e. 17.3.2003, he saw the appellant entering the building of the deceased on that date. During the course of investigation, the Investigating Officer arrested the appellant from his native place in Allahabad District and brought him at Mumbai on 27.3.2003. The appellant when was in the police custody expressed his willingness to discover the articles which he had robbed while committing the offence from the room belonging to the absconding accused Michel Chakravarty Patel.

(iv) Accordingly, articles belonging to deceased Smt. Ramaben were discovered at the instance of appellant from the room belonging to absconding accused Michel Chakravarty Patel. That the appellant was sent for medical examination to the police hospital Nagpada where the doctors obtained the hair from scalp of the appellant and also took his blood for blood grouping. The said articles were sent for Forensic Laboratory for examination. After receipt of the Chemical Analyzer's report and other related documents, the police submitted charge sheet in the Court of Metropolitan Magistrate, Mumbai.

(v) The learned Metropolitan Magistrate committed the said case to the Court of Sessions in view of the Section 209 of Cr. P.C. After committal of the said case, the Trial Court framed charge below Exhibit-2 on 29.6.2004 for the offences punishable under Sections 449, 397, 302 of the Indian Penal Code and under Section 37(1) read with Section 135 of Bombay Police Act. The said charge was read over and explained to the appellant in vernacular language. The appellant denied the charge and claimed to be tried. The defence of the appellant was of total denial and false implication. The appellant in his defence stated that the recovery effected by the police under Section 27 of the Evidence Act was a false recovery. The learned Trial Court after recording the evidence and after hearing the parties to the said case, was pleased to convict the appellant by the impugned judgment and order dated 31st August 2007.

3. Heard Mrs. Nasreen S.K. Ayubi, Advocate appointed for the appellant and Ms. R.M. Gadhvi, the learned APP for the State and with their assistance we have perused the entire record pertaining to the present case.

4. With a view to prove the guilt of the appellant, the prosecution in support of its case has examined in all 24 witnesses. After taking into consideration the entire evidence on record, it is clear that the present case is based on circumstantial evidence. It is the settled position of law that in a case of circumstantial evidence the circumstances on which the prosecution relies must be consistent with the sole hypothesis of the guilt of the accused. In a case resting on circumstantial evidence, it is incumbent for the prosecution to prove each and every circumstance on which it proposes to rely. The circumstances so proved should be of conclusive nature i.e. they should have a definite tendency of implicating the accused. The circumstances so established should form a complete chain which should exclude every hypothesis of innocence and unquestionably point towards the guilt of the accused. In other words the circumstances should be conclusive i.e. accused and the accused alone has

committed the crime.

5. In view of the aforesaid settled position of law now let us analyze the evidence which is on record and adduced by the prosecution in support of its case.

6. PW-1 Ashok and PW-4 Smt. Yogini are the son and daughter of deceased Smt. Ramaben. PW-1 in his testimony has stated that deceased Smt. Ramaben was his mother. He has three sisters. All the said three sisters are married and are residing with their respective husbands since their marriage. He was also residing separately. His mother was residing at flat no.404, 4th floor, Ashish building. His mother was alone residing in the said flat. There was a servant by name Balu (Malu) who was serving with his mother. The said servant used to sleep outside the flat in the corridor of the building during the night. That on 17.3.2003 at about 11.00 p.m. he received phone call from the neighbour namely Smt. Anjali Parekh and she informed him that the entrance door of his mother's flat was half open and the noise of water from the tap was being heard. She also tried to contact his mother on intercom but there was no response. PW-1 therefore contacted his elder sister Yogini Sahita and asked her to accompany her to the flat of his mother. After reaching Tirupati Apartments they contacted security guard namely Anil and thereafter PW-1, PW-4 and the said Anil went to the said flat. After reaching the said flat, they noticed that the entrance door was open and lock was also in open condition. They entered in the flat and found that their mother was lying in the pool of blood in living room (hall) of the said flat. They tried to shake her mother, however, they noticed that there was no response and their mother was not alive. They also found that the cupboard and other articles were ransacked. Shortly thereafter within 15 minutes police came to the spot. His sister namely Smt. Yogini Sahita (PW-4) was aware that Smt. Ramaben used to keep Rs. 2 lacs in cash in the cupboard and the said amount was found to be missing. PW-1 and police also found that the cupboard from the 2nd bedroom was also ransacked. The police thereafter recorded his statement. PW-1 has further deposed that fists of both hands of his mother were in tied condition. During the search of the said house, the police found one saree having blood stains on it in the kitchen. The police prepared panchanama of scene of offence. This witness has also identified the articles which were belonging to the deceased Smt. Ramaben namely the clothes which were on the person of the deceased Smt. Ramaben on the date of incident, yellow metal necklace with white colour stones and ear-rings and one white metal box with two small tortoises and one fish and one white metal crocodile, one ladies wrist watch of Titan company having leather belt. The said articles are Article 8 (colly.), Article-9 and Article-10 on record. PW-1 has specifically stated that the said articles were in use of his mother. He also identified the said white metal box with two small tortoises with one fish and one crocodile which were in the use of his mother and were kept in Devghar and his mother used to handle those articles at the time of worship. PW-4 Smt. Yogini Sahita, the daughter of deceased Smt. Ramaben and sister of PW-1 has also deposed in similar lines with that of Ashok (PW-1). PW-4 has also identified the articles which are on record to be of Smt. Ramaben i.e. her mother.

It is to be noted here that the aforesaid articles i.e. article nos. 8, 9 and 10 were discovered at the instance of appellant by effecting panchanama under Section 27 of the Evidence Act, in the presence of panch-witness Mr. Chandrakant S. Patil (PW-6). The said witness has proved the panchanama which is at Exhibit 33-A. In the cross-examination of PW-1, PW-4 and PW-6, no material which is useful to the appellant has been elicited at the instance of the appellant.

7. PW-7 Santnath D. Tiwari, the supervisor of Navshakti Security Force is examined to show that the appellant was working in the said company and was posted at Tirupati Apartments on 14.3.2003. This witness has produced the attendance register and a pay slip which are at Exhibits 36 and 37 respectively. PW-5 is Hemant L. Mandare, a delivery boy attached to Courier company namely S.K. Services Courier who on 11.3.2003 delivered two envelopes in the name of the deceased Smt. Ramaben which were accepted and acknowledged by the appellant by signing on the same. The said two envelopes were found in the living room where the dead body of deceased Smt. Ramaben was lying. PW-9, PW-10 and PW-11 are the witnesses to the panchanamas which are at Exhibits 44 to 56 wherein a specimen signatures of the appellant were taken by the police which were subsequently forwarded to the hand-writing expert for matching the said hand-writing with hand-writing which was on envelopes. PW-12 Mr. Jaynat K. Aher, the hand-writing expert deposed that there was similarities between the questioned documents and the signatures of the appellant which were taken as specimen signatures. Thus, the prosecution has proved the circumstance that the appellant was on duty on 11.3.2003 and received two envelopes by signing the same on behalf of the deceased Smt. Ramaben. The prosecution has further proved by examining PW-7 that the appellant was on duty at Tirupati Apartments upto 14.3.2003. The evidence of PW-7 also discloses that the appellant was on duty at Tirupati Apartments between 1.3.2003 to 14.3.2003 and proceeded on leave from 15.3.2003.

8. The prosecution has examined PW-23 namely Dinesh D. Mishra, the supervisor of Navshakti Security Force who has stated that he saw appellant entering the premises at Tirupati Apartments at about 9.45 p.m. on 17.3.2003. This witness had asked the appellant that "you have taken leave and where were you going". The appellant had replied that he had kept his uniform inside the said building and he was going to pick it up and thereafter the appellant went inside the building. The appellant returned after 45 minutes and upon being asked by PW-23 whether the appellant had brought his uniform, the appellant replied in the negative and left the place hurriedly. PW-23 further deposed that at about 10.45 p.m. on the same day, he received a message on intercom that the door of the flat of Smt. Ramaben was ajar. There was no response from inside. In the cross-examination, no material which is useful to the appellant has been elicited.

9. The next and most important circumstance on which the prosecution has relied is that the scalp hairs of the appellant were found in the fists of deceased Smt. Ramaben. PW-14 Dr. Vinod R. Agarwal who conducted autopsy on the dead

body of Smt. Ramaben has stated that he retrieved scalp hairs from the fists of both hands of the deceased as the hairs were clenched in the fists of the deceased. That the samples were sealed and labelled and were handed over to the Investigating Officer for sending the same to the Chemical Analyzer. The Column 21 of the postmortem notes also discloses that the hairs were removed from both the hands separately. PW-16 is Dr. Abasaheb Chavan was the Medical Officer then attached to Jagpada Police Hospital and had taken blood samples and scalp hairs of the appellant on 3.4.2003. The Chemical Analyzer's report which is at Exhibit 121 makes it very clear that the scalp hairs which were found in the hands of deceased Smt. Ramaben Somani and that of the appellant are similar. This is the most incriminating circumstance against the appellant that the hairs from scalp of the appellant were found in the fists of deceased Smt. Ramaben. The doctors who performed postmortem examination had retrieved the said hairs while performing postmortem immediately on 17.3.2003/18.3.2003 and the appellant was arrested after considerable period i.e. 27.3.2003 from his native place. We find that this is the most important circumstance in the chain of circumstances which have been put forth by the prosecution against the appellant.

10. The prosecution has examined PW-6 Chandrakant Patil in whose presence the clothes of the appellant namely pant and shirt which are article nos.13 and 14 respectively were discovered at the instance of the appellant. The said articles were having blood stains on it. The Chemical Analyzer's report shows that the blood group of the deceased Smt. Ramaben was "AB" and the blood stains which were found on the clothes of the appellant were of the blood group "AB". The appellant did not offer any explanation about the finding of a human blood which is the blood group of deceased on his clothes while recording his statement under Section 313 of Cr. P.C. This is an important circumstance in the chain of circumstances.

11. The prosecution has thereafter relied on the circumstance of discovery of the incriminating articles from the appellant. PW-6 Chandrakant Patil, is also a panch-witness to the discovery panchanama of the articles which were recovered at the instance of appellant from the room of absconding accused Michel Chakravarty Patel by effecting discovery panchanama under Section 27 of the Evidence Act at Exhibit 33-A. The said articles which are article-8 (collectively), article-9 box and article 10 wrist watch of deceased Smt. Ramaben have been identified by PW-1 and PW-4 as those of the deceased.

12. Thus, it is clear that the circumstances against the appellant are namely (1) he was seen by PW-23 while entering into the building of the deceased on 17.3.2003 at about 9.45 p.m., though he was on leave from 14.3.2003 from his duty, (2) finding of scalp hairs of the appellant in the fists of the deceased at the time of performing the postmortem examination and its matching with that of appellant by the Chemical Analyzer's report, (3) finding of blood stains of the deceased on the clothes of the appellant which are of "AB" group and which have

been proved by the Chemical Analyzer's report, and (4) the discovery of the ornaments and/or incriminating articles belonging to the deceased at the instance of the appellant in the presence of PW-6 and identification of the said articles by PW-1 and PW-4 i.e. son and daughter of Smt. Ramaben.

13. Thus, after taking into consideration the entire evidence available on record, we are of the considered opinion that the prosecution has beyond reasonable doubt proved the circumstances which undoubtedly form a complete chain and which also rules out the hypothesis that any other person than the appellant is the perpetrator of the present crime.

14. Thus after taking into consideration the entire evidence available on record, the circumstances so proved by the prosecution are of conclusive in nature i.e. they have definite tendency of implicating the appellant. The circumstances so established are forming the complete chain which exclude every hypothesis of the innocence of the appellant and unquestionably point the finger of guilt towards him. In our opinion, the circumstances which are emerging from the record are capable of only one inference that the appellant has committed the present crime. The circumstances adverted to, by us, completes the chain of circumstances and the circumstances exclude every hypothesis of innocence of the appellant and unquestionably points towards the guilt of the appellant.

15. We find no merits in the present appeal and is accordingly dismissed.

16. Before parting with the present judgment, we may place on record the efforts put in by the learned Advocate Mrs. Nasreen S.K. Ayubi appointed by the Legal Aid Panel in preparing the concise notes of evidence in tabular form while assisting the Court and we quantify her fees at Rs. 5000/- to be paid to her by the High Court Legal Services Committee.