

(2016) 01 BOM CK 0021
In the Bombay High Court
Case No : Criminal Appeal No. 720 of 2009

Raju	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 05-01-2016

Acts Referred:

Evidence Act, 1872 — Section 106, Section 145, Section 27
Penal Code, 1860 (IPC) — Section 302

Citation : (2016) 01 BOM CK 0021

Hon'ble Judges : V.K. Tahilramani, Actg.C.J. and Sadhana S. Jadhav, J.

Bench : Division Bench

Advocate : A. Majid H. Bandekar, Advocate, for the Appellant; A.S. Pai, APP, for the Respondent

Final Decision : Dismissed

Judgement

Sadhana S. Jadhav, J.—1. Appellant herein is convicted for offence punishable under section 302 of Indian Penal Code and sentenced to undergo life imprisonment and fine of Rs. 2000/- in default to suffer rigorous imprisonment for 2 months by Additional Sessions Judge Baramati in Sessions Case No. 33 of 2008 vide Judgment and Order dated 13/05/2009. Hence, this appeal.

2. Such of the facts necessary for the decision of this appeal are as follows.

3. On 30/09/2007 Ravindra Lalbighe lodged a report at city police station Baramati alleging therein that on 30/09/2007 in the morning at about 9.30 a.m., when he was in front of his house he had seen people have gathered in front of the house of Raju Chavan. Out of curiosity he had enquired as to what had happened. He went into the house and saw that Jaya alias Barki daughter of Raju Chavan was lying on the ground. There was oozing of some yellow substance from her nose. Her belly had bloated. There was a ligature mark on her neck. The dead body of Jaya alias Barki was sent for post mortem. After conducting autopsy, medical officer had given the opinion as follows.

"Death due to asphyxia due to strangulation".

4. Raju Chavan was seated besides his daughter and other three minor daughters. Upon enquiry Raju Chavan retaliated by saying that it is his daughter and he may do whatever he desires. Upon this reaction first informant had rightly suspected that Raju Chavan had caused homicidal death of his minor daughter. He reported to the police and on the basis of his report crime no. 150 of 2007 was registered against Raju Chavan for offence punishable under section 302 of Indian Penal Code. Investigation was set in motion. After completion of investigation charge-sheet was filed on 30/12/2007. Case was committed to the court of Sessions and registered as Sessions Case No. 33 of 2008. Prosecution examined as many as 8 witnesses to bring home the guilt of the accused.

5. P. W. 2 Ravindra Pawar is the panch for scene of offence panchanama. He has deposed before the court that at the time of drawing of scene of offence panchanama accused/appellant was present. He had shown the scene of offence and had informed that he had killed his daughter by pressing her neck. A piece of rope was recovered at his instance. Scene of offence panchanama is at Exhibit 12. A memorandum was recorded for the purpose of recovery of a piece of rope. Memorandum is at exhibit 13 and recovery panchanama is at exhibit 14. It is elicited in the cross-examination that the house was not in a locked condition when investigating agency had been to draw the scene of offence panchanama. Neighbours had gathered.

6. P. W. 3 Sou. Ranjana Dasharath Ubale. She was acquainted with the accused but she had no knowledge in respect of number of the children he had. She was providing tiffin to the accused. She has deposed before the court that on 30/09/2007 at about 8.30 p.m., she had met the accused who had come to her house to fetch his tiffin box. After she had returned home she was informed by the accused that he assaulted his daughter. The next day in the morning at about 9.00 a.m., daughter of the accused namely Priyanka had been to residence of P.W. 3. Thereafter Priyanka had informed P.W. 3 that their father had assaulted her younger sister. She has deposed that accused had informed her that he had assaulted his daughter but had not killed her.

7. Upon perusal of the testimony of P.W. 3 it appears that she has deposed in her examination-in-chief as follows:

"Accused discloses with me simply that he assaulted his daughter. He did not report with me that he killed his daughter".

8. At this juncture prosecution had prayed for declaring the witness hostile and chose to cross examine her. In the cross-examination by prosecutor P.W. 3 has admitted as follows:

"Accused reported me that he had killed his young daughter".

This is positive evidence elicited in the cross-examination by the State.

9. Learned counsel for the appellant submits that no implicit reliance can be placed upon the evidence of P. W. 3 since she was declared hostile by the prosecution. According to learned counsel, it cannot be therefore said that there was extra judicial confession by the accused before P. W. 3, however this submission is unwarranted.

10. Section 145 of Indian Evidence Act contemplates:

"A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

11. Resort to this section is necessary only if a witness denies that he had made a former statement. A witness can be contradicted only when he denies his statement and not when he admits it. The object of this section is to give the witness a chance of explaining the discrepancy or inconsistency and to clear up a particular point of ambiguity or dispute. In any case, evidence of hostile witness also cannot be discarded in totality. The part of the evidence which is in the form of an admission about the contents of the earlier statement can be taken into consideration. In the present case, P.W. 3 in her cross-examination by the State has categorically admitted that the accused had disclosed to her that he has caused homicidal death of his daughter. Suffice to say that extra judicial confession made before P.W. 3 can be relied upon by this Court.

12. P. W. 4 Ravindra Lalbighe is the first informant. He has proved the contents of the F.I.R. which is at Exhibit 17. He has deposed before the court that he had no knowledge in respect of caste of the accused is notified as scheduled caste or any other party including Bhartiya Samaj Party.

13. P. W. 5 is Kauslyabai Shinde. She happens to be mother-in-law of present appellant. She has deposed before the court that Nanda was also working as vegetable vendor and that accused was not doing any work. He used to interfere with every piece of work of his wife and therefore there were frequent quarrels between them. She has deposed that one Suresh Kale had reported to her about the incident. They rushed to Baramati at about 3.00 to 4.00 p.m. By the time they reached, post mortem examination on the dead body of Jaya alias Barki was completed.

14. P. W. 6 Kajol is the daughter of the appellant. She has deposed before the court that at the relevant time her mother had been to the place of her grand parents. Their father used to bring tiffin from one lady. On the previous day of the incident, her father had brought tiffin for all the three daughters. Her younger sister Jaya alias Barki was continuously crying and so her father pressed the neck of Jaya. Jaya fell unconscious. Thereafter, her father strangled her by using a lace. She was frightened. She retired for sleep. In the morning she tried

to wake up her younger sister, however, she did not wake up. At that time Ravindra Lalbighe had come to their house. Upon being questioned by Lalbighe her father had reacted by saying that:

"It is his daughter, he can do whatever he likes".

15. In the cross-examination an omission is elicited to the extent that P. W. 6 had not disclosed to the police in her previous statement that her father had pressed the neck of Jaya alias Barki and strangled her by using a lace. Learned counsel for the appellant submits that it is a material omission as the actual act of strangulation is not stated by P. W. 6 before the police and that substantive evidence appears to be tutored version. It is pertinent to note that P. W. 6 has deposed before the court that in her presence her father had reacted to Lalbighe by saying that he could do whatever he likes with his daughter. This is a clear indication that prelude to the incident as well as the fact of death of Jaya alias Barki was within the special and exclusive knowledge of appellant.

16. It would be incumbent upon the accused to explain the cause of death of his minor daughter as on that day at the relevant time she was within the exclusive custody of her father, moreover the incident had occurred in the intervening night of 29/09/2007 and 30/09/2007.

17. Section 106 of Indian Evidence Act contemplates:

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

18. In the present case, prosecution has established that Jaya alias Barki had died homicidal death in the intervening night of 29th and 30th September 2007. That the deceased happens to be minor daughter of the appellant. Prosecution has also proved that appellant was at home since the previous evening. It is also proved that deceased was continuously crying since she was missing her mother. It is also proved that first informant had questioned the appellant as to what he has done and that appellant had reacted by saying that it is his daughter and he could do whatever he likes. As against this, accused has taken a plea of alibi. According to him, he had given food to his minor daughters on the previous evening and had then left the house and that he does not know as to how his minor daughter had died.

19. Burden of proving the plea of alibi by positive evidence lies on the accused who raises it. It is clear from the records that accused has only raised a plea of alibi but has not made any efforts to lead evidence to prove that he was not at home during the intervening night. Learned Sessions Court has therefore rightly not considered the plea of alibi.

20. Learned counsel for the appellant submits that prosecution has failed to bring on record the motive on the part of the accused to eliminate his daughter. Prosecution has not examined any independent witness such as neighbours to establish that accused/appellant has caused homicidal death of his daughter. All

this is hypothetical. The fact of homicidal death is proved by the prosecution by leading cogent and convincing evidence. What is in the mind of a person and the reason for doing a thing is an aspect within the special knowledge of that person. Prosecution is not expected to meet every hypothetical question raised by the defence. Expecting prosecution to lead evidence and establish fanciful possibilities raised by the defence would deflect the course of justice and hence the submission cannot be taken into consideration.

21. P. W. 7 Dr. Sambhaji Kokane was working as Medical Officer with Silver Jubilee Hospital at Baramati. He had received the dead body of a female child Kumari Jaya Alias Barki Rajendra Chavan for performing autopsy. He had performed autopsy on the dead body of the said child on 30/09/2007. On external examination, he found ligature mark completely encircling the neck horizontally below the thyroid cartilage admeasuring 24 c.m. in length and one c.m. in breadth. Ligature mark was blackish brown in colour. There were abrasions and bruises around the ligature mark. Upon internal examination he found that both lungs were congested and cut section blood stain froth was present. On opening the abdomen he found some semi-digested food present in the stomach. He had arrived at a conclusion that cause of death of the said victim was due to asphyxia due to strangulation. He had given positive opinion that it is a homicidal death. That presence of semi-digested food in the stomach indicated that child had died within a span of 4 to 6 hours of her last meal. In the cross-examination P. W. 7 has specifically stated that he does not agree with the suggestion that in cases of strangulation amongst the children most of the death are due to accidental strangulation. In view of this admission, the submission of the learned counsel that the strangulation was accidental would not only be unfounded but it would be fanciful submission.

22. Upon perusal of post mortem notes which is at exhibit 22, it would be seen that rigor mortis was well developed. PM lividity was present. Upper limbs flexed at elbow. Lower limbs extended at knee joints. Post mortem was conducted at 2.30 p.m. on 30/09/2001. The presence of well marked rigor mortis would be a clear indication that she had died at least more than 10 hours prior to conducting the post mortem which means she had died in the middle of the intervening night of 29th and 30th September 2007. Accused/appellant has failed even to explain as to where he was at the relevant time and therefore it can be inferred that accused was present at home when his minor daughter Jaya alias Barki died homicidal death. It is a custodial death and it would be incumbent upon the appellant to explain the circumstances in which his minor daughter had died.

23. P. W. 8 Vikas Ramgude is the Investigating Officer. He has deposed before the court that he investigated the matter in accordance with law. He had recorded the memorandum of accused under section 27 of Indian Evidence Act and pursuant to the said memorandum a rope was recovered at the instance of the accused. The panchanama is at exhibit 14. In the absence of any evidence as far as alibi is concerned, there is no doubt that this is a case of custodial death.

The reaction of the accused to the first informant speaks volumes for itself. There is extra-judicial confession before P. W. 3.

24. In view of the above discussion, this Court is of the opinion that prosecution has proved the guilt of the accused beyond reasonable doubt. No interference is warranted. Hence, following order.

(i) Appeal stands dismissed.

(ii) Judgment and Order dated 13/05/2009 passed by Additional Sessions Judge Baramati in Sessions Case No. 33 of 2008 is hereby upheld.

(iii) Professional fees of the appointed Advocate be paid to him as per Rules.

(iv) Appeal stands disposed of.