
(2011) 09 BOM CK 0103
In the Bombay High Court
Case No : Criminal Appeal No. 746 of 2004

Raju Balaram Gujrathi

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 06-09-2011

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 392, 394, 397, 449

Citation : (2011) 09 BOM CK 0103

Hon'ble Judges : D.D. Sinha, J;A.R. Joshi, J

Bench : Division Bench

Advocate : Pooja Bhojne, for the Appellant; U.V. Kejariwal, Assistant Public Prosecutor for the State, for the Respondent

Final Decision : Allowed

Judgement

A.R. Joshi, J.—Present Criminal Appeal is preferred by the Appellant/accused challenging the order dated 2nd & 5th April, 2004 passed by the Additional Sessions Judge of City Civil & Sessions Court in Sessions Case No. 308 of 2003. By the impugned judgment and order, present Appellant/accused was convicted for the offences punishable under Sections 449, 392, 394, 397 & 302 of Indian Penal Code. For the offence punishable u/s 449 of Indian Penal Code, he was sentenced to suffer R.I. for 10 years and fine of Rs. 1000/-, in default, to suffer further R.I. for 1 year. For the offence punishable u/s 392 r/w. Section 397 Indian Penal Code he was sentenced to suffer R.I. for 7 years and to pay fine Rs. 1000, in default, to suffer further R.I. for 1 year. For the offence punishable u/s 394 Indian Penal Code, he was sentenced to suffer R.I. for 7 years and to pay fine of Rs. 1000, in default, further R.I. for 1 year. For the offence punishable u/s 302 Indian Penal Code, he was sentenced to suffer imprisonment for life and to pay fine of Rs. 1000/-. The substantive sentences were directed to run concurrently. Set-off was given to the Appellant/accused for the period he is in custody i.e. since the date of his arrest on 20.2.2003.

2. In order to appreciate the rival arguments, the case of the prosecution, in

nutshell, is narrated as under:

On 26.1.2003 at about 8:00 a.m.in Singhania Building, B Block, Grant Road (E), Mumbai -7, the deceased Smt. Manjula Shah was found dead in her flat and was in pool of blood. The incident took place between 7:30 a.m. to 8:00 a.m. on that morning and it was a case of house trespass by the assailant and robbery of valuables like gold jewelry. During the said incident, there was assault on the woman and in which she died.

3. On the fateful morning at about 8:15 a.m., the maid servant (PW-10) who used to work in the flat of the deceased woman, found that Smt. Manjulaben was lying in the flat in pool of blood and thus sensing seriousness of the situation, she rushed to the house of one Ramesh Shah - brother of the deceased. At the house of Ramesh Shah she found Mehul Shah - son of Ramesh Shah. She informed him that Manjulaben was lying in a pool of blood in her flat. The said Mehul Shah (PW-1) informed his other relatives and went to the flat of his aunt Manjulaben. After noticing the situation and seeing Manjulaben in a pool of blood and finding that the cupboard was open and various articles were ransacked, he went to the D.B. Marg police station and informed the Officer on duty. His statement was recorded by the police and it was treated as the First Information Report (Exh.6). Offence was registered against the unknown assailants for various offences of house trespass, robbery etc. and also for the offence of murder during commission of such robbery.

4. PW-8 PI Shri Shyam Laxman Dhanavade was on duty at D.B. Marg Police Station on that morning. He accompanied the complainant (PW-1) along with other police staff to the place of offence. He called the local medical officer and ascertained that Manjulaben was dead. He recorded the FIR as per the information of complainant Mehul Shah (PW-1). Inquest-cum-spot panchnama was conducted on the spot. Photographs of the situation were taken showing that various articles were lying scattered and the cupboard was open. Photographs of the dead body were also taken. During the investigation, blood stained clothes of the deceased were taken charge of. Also during investigation locks of hairs which were found in both the fists of deceased Manjulaben were taken charge of. Various other articles were also taken charge of. Other samples were collected. Dead body was sent for postmortem and postmortem report was subsequently obtained, which is Exhibit-14.

5. During the investigation, fingerprint expert Shri Hemchandra Bane (PW-7) was called. He took various chance prints and started his work. Admittedly, till about 20th February, 2003 there was no trace of the assailants though probably the investigation was going on. According to the prosecution only on 19.2.2003 there was breakthrough in the said case. This was by way of revelation made by the present Appellant/accused by way of his alleged extra-judicial confession before one Ramesh Shah (PW-3) (brother of deceased). According to PW-3, the present Appellant/accused who was admittedly working as servant with deceased Manjulaben, made extra-judicial confession mentioning that he had done away

with the deceased for the purpose of getting money. Allegedly, the Appellant/accused confessed and gave all the detailed narration as to how the event happened on the fateful morning and how he assaulted and killed Manjulaben. Though, allegedly such revelation was made by the present Appellant/accused on 19.2.2003 before PW-3, PW-3 went to D.B. Marg police station on the very next date i.e. on 20.2.2003, but statement of said PW-3 was recorded only on 24.2.2003 and not earlier.

6. It is also case of the prosecution that on 20.2.2003 present Appellant/accused was put under arrest on the premise that he had made extra-judicial confession before PW-3 on earlier date i.e. on 19.2.2003. In spite of such arrest on 20.2.2003, there was no further progress in the investigation, moreover, there was no search of the residence of the Appellant who was residing in the vicinity of residence of the deceased in fact at the back of the said building, under the staircase.

7. According to prosecution, on 24.2.2003 the Appellant/accused made a voluntary statement to produce the weapon of assault and stolen articles. Accordingly, memorandum panchnama was drawn calling the panch witnesses including PW-6 Adi Modi. Allegedly, in furtherance of the said memorandum panchnama (Exh.18), the Appellant/accused led police party and panchas to his house in the same Singhania building where the deceased was residing. From his house, he produced the knife, his shirt and his pant. Those articles were taken charge of by the police. Thereafter the Appellant/accused took the police party and panchas to the pump-house near his room. He opened the door of pump-house by obtaining key from his brother and after unscrewing the switch-board of electric supply, took out one carry bag and produced the jewelry items - apparently six items made of gold and eight items of Bentex Brand and one small glass made of Silver metal. Goldsmith was called and the articles were valued. The value was taken as Rs. 45,000/-. Said articles were taken charge of under the panchnama (Exh.18-A).

8. It is also case of the prosecution that the accused showed one shop from where he had purchased some articles by paying Rs. 2419/-. Accused also took the police party and panchas to two persons mentioning that he had taken loan amount from the said persons and had repaid the said loan. According to prosecution, detailed panchnama was drawn and respective amounts were recovered from the shopkeeper and two other persons. Allegedly, an amount of Rs. 2419/- was recovered from the shopkeeper and amount of Rs. 14,000/- & Rs. 10,000/- was recovered from the said two persons under the panchnama. According to the prosecution, the said amount was from the cash amount robbed by the accused from the house of the deceased.

9. During the investigation, statements of various witnesses were recorded including statement of maid-servant (PW-10), her minor daughter (PW-9), a milkman (PW-11) and on completion of investigation charge sheet was filed and the matter was committed to the Court of Sessions. Finding the circumstantial

evidence alleged against the accused, sufficient to bring home the guilt for the offences charged, the accused was convicted by the Sessions Court and it is the order which is challenged in the present Appeal. Admittedly, since the date of arrest i.e. since 20.2.2003 till date the Appellant/accused is in custody.

10. Prior to discussing the rival arguments, certain admitted position is mentioned as under:

(i) The entire case of the prosecution is based on circumstantial evidence. The circumstances being accused producing the weapon of offence, his blood stained clothes and the stolen jewelry and cash amount.

(ii) There was alleged extra-judicial confession given by the Appellant/accused to PW-3 Ramesh Shah, made on 19.2.2003 and till that time there was no clue for the investigating agency regarding the assailants. In fact, there was no suspicion raised about the Appellant/accused by anybody.

(iii) The Appellant/accused was at times used to work as a servant in the house of the deceased, though, was no permanent servant. Admittedly, he was frequently visiting the house of the deceased for some sundry work and was well acquainted with the relatives of deceased including PWs-1, 2 & 3.

(iv) Admittedly, death of the deceased Manjulaben was homicidal and due to the injury sustained mainly on her neck and other parts of the body due to sharp edged weapon.

11. Bearing in mind the above admitted position and considering the case of the prosecution mainly based on the alleged extra-judicial confession and circumstance as to recovery of weapon of assault and stolen articles at the instance of Appellant/accused, much is argued on behalf of the Appellant by learned Advocate Ms. Pooja Bhojne on these aspects. The substantive evidence of PW-3, PW-6 recovery panch, and PW-7 a Fingerprint Expert, is required to be construed with care and caution. The substantive evidence of other witnesses is not of much significance in the present case considering the admitted position mentioned above. Said other witnesses are PW-1 complainant Mehul Shah, PW-2 another relative of the deceased Shri Hasmukh Jain and PW-4 Dr. Agrawal, who performed the postmortem. At this stage, it must be mentioned that the homicidal death of the deceased is not in question, considering the evidence of PW-4 Dr. Agrawal, who found injuries on the dead body, which were ante mortem.

12. Other witnesses are PW-6 panch witness for scene of offence and inquest panchnama, PW-8 Investigating Officer, PW-9 minor girl Miss. Pratiksha Hate, PW-10 maid servant of Manjulaben, mother of PW-9 and PW-11 a milk vendor. According to PW-9 Pratiksha Hate she stayed at the house of the deceased on the earlier night and left the house at 7:30 a.m.. According to PW-10 maid servant, when she reached the house of the deceased in the morning at about 8:15 a.m. she saw the dead body of victim Manjulaben lying in a pool of blood. According to PW-11 milkman he was at the flat of the deceased at about 8:00

a.m. and had knocked the door of the flat but nobody opened it.

13. As mentioned above, the case is based only on circumstantial evidence and said circumstances are as under :

- (i) alleged extra-judicial confession of the accused made before PW-1;
- (ii) recovery of weapon of assault, blood stained clothes, stolen articles and cash amount at the instance of the accused;
- (iii) finding of chance print of the accused on the cupboard in the flat of the deceased.

14. At this juncture, from the substantive evidence of the Investigating Officer (PW-8) it is an admitted position that there is nothing brought on record as to what was the investigation from the date of offence till arrest of the Appellant/accused. It is also admitted position that though allegedly the hair samples found in the fists of the deceased and hair samples of deceased and accused were sent for C.A., there was no report forthcoming. Moreover, though allegedly said samples were sent for DNA test and also an amount of Rs. 10000/- was paid for such analysis, said DNA report is not produced during the trial and there is nothing on record as to what had happened to such DNA test. It is also an admitted position that though allegedly the fingerprints of the Appellant/accused were taken for sending to the Fingerprint Expert for comparison with chance prints, no panchnama was drawn. It is also an admitted position that the jeweler, who was allegedly called for valuation of the ornaments allegedly recovered at the instance of the Appellant/accused, is not examined nor his statement was recorded. It is also an admitted position that two persons who allegedly gave loan to the Appellant/accused and from whom respective amounts of Rs. 14000/- & Rs. 10000/- were recovered, were not examined; so also their statements were not recorded. This factual position is emerging from the substantive evidence of Investigating Officer (PW-8). It is to be ascertained whether the case of the prosecution as to allege extra-judicial confession and recovery of the weapon of assault and jewelry and cash, has been established by prosecution.

15. During the arguments, learned Advocate Ms. Pooja Bhojne for the Appellant/accused pointed out that the substantive evidence of PW-3 do not in any way inspire confidence so as to place assurance on the alleged extra-judicial confession made by the present Appellant/accused before him. It is also argued that identification of the jewelry items by PW-3 as the jewelry items belonging to the deceased, is also doubtful and cannot be accepted in as much as there is no description of any of such items given by PW-3 while giving his statement to the police. More so, when such statement was recorded on 24.2.2003 and by that time the ornaments were already in possession of the police. While analyzing this argument, the conduct of PW-3 Ramesh Shah as spelt out from his substantive evidence is significant, according to him only on 19.2.2003 in the evening the Appellant/accused confessed before him and narrated the details as to how he entered the house of Manjulaben, how he had done away with her and stolen the

jewelry articles. On careful perusal of the substantive evidence of PW-3, it is revealed that on such revelation from the accused on 19.2.2003, immediately on the next day he went to the police station. However, admittedly his statement was not recorded. At the cost of repetition, it must be mentioned that according to police, his statement was recorded on 24.2.2003 and on that day he was shown the jewelry allegedly recovered at the instance of the accused and which he identified as belonging to the deceased. PW-3 is silent as to why he did not give his statement to the police immediately after 19.2.2003. He did not state that he was in shock due to revelation made by the accused. As against such factual position, the substantive evidence of PW-8 Investigating Officer is to the effect that PW-3 informed him regarding the extra-judicial confession made by the accused and on knowing such revelation on 20.2.2003, the accused was put under arrest. According to the I.O. PW-8, PW-3 came and informed him regarding the confessional statement of the accused and apparently on hearing such extra-judicial confession, PW-3 became unconscious and admitted in the hospital on 19.2.2003. This variance in the substantive evidence of PW-3 & PW-8 is of much significance which leads us to doubt whether there was any extra-judicial confession by the accused on 19.2.2003 and whether there was any hospitalization of PW-3 on knowing such shocking revelation and as to whether it was the cause for PW-3 not to immediately give his statement to the police earlier to 24.2.2003. In other words, it must be mentioned that such story developed by the prosecution, definitely creates a doubt as to the authenticity of theory of extra-judicial confession and further recovery of the ornaments and cash amounts.

16. On the aspect of authenticity or otherwise of extra-judicial confession, following authorities are cited on behalf of the Appellant:

(i) *Heramba Brahma and Another Vs. State of Assam*,

(ii) 1999 SCC (Cri) 12 (*Dwarkadas Gehanmal v. State of Gujarat*.)

17. Coming to the second argument as to alleged recovery at the instance of the Appellant/accused which is in fact the most substantial evidence which has been greatly relied upon by the trial Court, there are various infirmities and improbabilities i.e. to say the conduct of the Appellant/accused in keeping the weapon of offence that also blood stained and keeping his blood stained shirt & pant at his residence appears to be improbable. Though, as argued on behalf of the State, it can be stated that conduct of a particular person cannot be predicted as to how he will react in given set of circumstances, still considering that the said articles i.e. knife and blood stained clothes, per se incriminating if such position is established, are the articles of such a nature that any prudent man would try to get rid of them much less keeping them at his own house. This aspect is to be viewed in juxtaposition of the circumstances as to the jewelry items were allegedly found in the pump room and inside the electric box and admittedly the pump room was accessible to other persons apart from the Appellant/accused. The recovery of the ornaments and also the alleged cash

amount is again required to be viewed in view of the admitted position and attaining circumstance, such as, no examination of the jeweler who was allegedly called for valuation and no examination of two persons from whom allegedly the cash amounts Rs. 14000/- & Rs. 10000/- were recovered.

18. Considering the effect of evidence of panch witness (PW-6) as to alleged recovery at the instance of the Appellant accused and the evidence of PW-3 & PW-8, in our considered view the Sessions Court had fallen in an error in accepting such recovery as proved, thereby holding the accused guilty for the offence of robbery and murder.

19. On the point of circumstantial evidence by way of recovery of articles, following authority is cited on behalf of the Appellant:

(i) Sattatiya @ Satish Rajanna Kartalla Vs. State of Maharashtra,

Pointing out the ratio propounded by the said authority, it is submitted that in order to determine the genuineness of the recovered articles, it is relevant to consider what is the nature of place from which the articles are recovered. In our opinion, recovery in a particular matter is to be considered whether acceptable or not, only on the facts of the particular case. In that view of the matter, considering the alleged recovery of knife and clothes of the Appellant/ accused from his house that also after about a month and recovery of the ornaments from the electric box situated inside the pump room - a public place, are the significant aspects creating a reasonable doubt whether there was such recovery at the instance of the Appellant. This is more so when the jeweler who allegedly valued the recovered articles and the two persons who had allegedly given loan to the Appellant, were not examined by the prosecution.

20. Lastly, it is argued on behalf of the Appellant that another circumstance as to finding of chance fingerprint of the Appellant on the cupboard is the evidence which is not beyond doubt. In other words, it is submitted that though PW-7 - a fingerprint expert has been examined on this count, still the fact remains that admittedly no panchnama was drawn by the Investigating Officer while allegedly taking the specimen fingerprints of the accused. This position has been accepted by the Investigating Officer (PW-8). On this aspect as to voluntariness of the accused for taking his fingerprints or his handwriting, following authorities are cited before us :

(i) Sheo Narain and Another Vs. Rawat and Others,

(ii) AIR 1952 TC 482 (State v. Parameswaran Pillai)

21. By pointing out the ratios of the above cited authorities, it is submitted that the accused cannot be compelled to give evidence against himself and consequently without there being anything on record as to authorization from the Court, the procedure adopted by the police of taking fingerprint specimen of the accused raises a doubt. Considering the submission and the ratios propounded by the above authorities, suffice it to say that in the present matter the

procedure, adopted by the Investigating Agency for establishing that the fingerprint of the accused were found on the cupboard, do not inspire confidence. Otherwise also considering the accepted position that at times the Appellant/accused was visiting the house of the victim and was doing some sundry work as a servant by way of casual help, the evidence of fingerprint, as alleged by the prosecution, will not be of much significance so far as establishment of the guilt for the offence of robbery and murder is concerned.

22. In view of the above discussion, it must be said that the Sessions Court had fallen in an error in accepting the evidence of the prosecution witnesses sufficient to bring home the guilt of the accused for the offences charged. Consequently the impugned judgment and order is required to be interfered and the same is set aside resulting in acquittal of the Appellant/accused. Hence, the order:

ORDER

- i. Criminal Appeal No. 746 of 2004 is allowed;
- ii. Impugned judgment and order dated 2nd & 5th April, 2004 passed by the Additional Sessions Judge of City Civil & Sessions Court, Bombay in Sessions Case No. 308 of 2003 is set aside.
- iii. Appellant/accused is released from jail, if not required in any other matter.
- iv. If fine amount is already paid by the accused, the same shall be refunded to him.