

(2013) 03 BOM CK 0029

In the Bombay High Court

Case No : Criminal Appeal No. 896 of 2007

Ramchandra @ Rama Shankar Madane

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 07-03-2013

Acts Referred:

Evidence Act, 1872 — Section 106
Penal Code, 1860 (IPC) — Section 302, 304

Citation : (2013) ALLMR(Cri) 2790

Hon'ble Judges : V.K. Tahilramani, J;Sadhana S. Jadhav, J

Bench : Division Bench

Advocate : Rohini M. Dandekar, for the Appellant; P.S. Hingorani, APP, for the Respondent

Final Decision : Partly Allowed

Judgement

V.K. Tahilramani, J.—This appeal is directed by the appellant-original accused against the judgment and order dated 13.6.2007 passed by the learned Sessions Judge, Satara in Sessions Case No. 125 of 2006. By the said judgment and order, the learned Sessions Judge convicted the appellant u/s 302 of IPC and sentenced him to RI for life and to pay a fine of Rs. 500/- in default RI for one month. The prosecution case briefly stated, is as under:

The appellant was the husband of Kasabai (deceased). They had one son i.e. P.W. 1 Deepak and two daughters i.e. Manda and P.W. 7 Kunda. They were residing at "Date-Vasti", Phaltan. District Satara. The occupation of the appellant and the deceased was fishing. Every night the appellant and the deceased used to go to Banganga river at about 10.00 p.m. for fishing and used to return by 3.00 a.m. At the time of the incident, Kunda had come to the house of the appellant and the deceased for delivery. It is the prosecution case that the appellant used to suspect character of his wife Kasabai and he used to assault her. On 21.3.2006 at about 8.00 p.m. there was quarrel between appellant and his wife Kasabai. The appellant was abusing Kasabai as he was suspecting that she was having relation

with somebody. On 21.3.2006 at about 9.30 p.m. the appellant, deceased, P.W. 1 Deepak and P.W. 7 Kunda had dinner. Thereafter at about 10.00 p.m. both the appellant and the deceased left the house to go fishing. They went towards river Banganga. At about 7.00 a.m. when P.W. 1 Deepak got up, he noticed that his mother Kasabai and father i.e. the appellant and the deceased had not come home. Therefore, at about 7.30 a.m. he went towards river Banganga. On the way, he saw his mother Kasabai lying dead near the field of one Arun Date. There were injuries on her forehead and on the backside of the head. P.W. 1 Deepak then lodged F.I.R. Thereafter, investigation commenced. The dead body of Kasabai was sent for post-mortem.

P.W. 4 Dr. Vaghmale performed postmortem on the dead body of Kasabai. Dr. Vaghmale found following injuries on the body of Kasabai:

- 1) C.L.W. over fore-head 1 cm above breach of nose, in mid line ? cm. x 1/4th x scalp deep. Effusion of blood in forehead skin on cut open. No fracture.
- 2) C.L.W. over left parietal occipital region 14 cm. x 2 cm. x scalp deep. No fracture, irregular running downwards and medial, 9 cm. Posterior to left ear. 4 cm. lateral to mid-line.
- 3) C.L.W. over right temporal region 5 cm. x ? x scalp deep, obliquely placed 10 cm. lateral to mid line and 7 cm. above right ear. No fracture.
- 4) Contusion on hypo-gastric region on right side 1 cm. lateral to mid-line, below umbilicus 5 cm. x 4 cm. oval shape, brownish discolouration of skin, effusion of blood in abdominal layer after cut open.
- 5) Contusion on right Inguinal region, parallel right inguinal ligament 17 cm. x 8 cm. brownish discolouration, effusion of blood in abdominal wall, after cut.

The appellant was arrested on 22.3.2006. His clothes were found blood stained, hence, they came to be seized in the presence of panch witness P.W. 8 Dattatraya vide panchnama Exh. 28. At the time of his arrest, sickle was found with him which also came to be seized in the presence of panch witness P.W. 8 Dattatraya. During investigation, stick came to be recovered at the instance of the appellant in the presence of panch witness P.W. 3 Tukaram vide panchnama Exh. 16 and 16A. After completion of investigation, the charge sheet came to be filed against the appellant u/s 302 of IPC.

2. Charge came to be framed against the appellant u/s 302 of IPC. The appellant pleaded not guilty to the said charge and claimed to be tried. The defence of the appellant is that of total denial and false implication. After going through the evidence adduced in this case, the learned Sessions Judge convicted and sentenced the appellant as stated in para 1 above. Hence, this appeal.

3. We have heard the learned appointed advocate for the appellant and the learned APP for the State. After giving our anxious consideration to the facts and circumstances of the case, arguments advanced by the learned advocates for the

parties, the judgment delivered by the learned Sessions Judge and the evidence on record, for the below mentioned reasons, we are of the opinion that the appellant caused death of his wife Kasabai by assaulting her with stick.

4. There is no eye witness in the present case and the case is entirely based on circumstantial evidence. The evidence of P.W. 1 Deepak and P.W. 7 Kunda who are the son and daughter of the appellant and the deceased, shows that the appellant used to suspect character of his wife Kasabai. On the day of the incident, at about 8.00 p.m. there was quarrel between the appellant and his wife Kasabai. The appellant was abusing Kasabai as he was suspecting that she was having relations with somebody. At about 9.30 p.m. they had food and at 10.00 p.m. the appellant and his wife left the house to go fishing. In the morning, when P.W. 1 Deepak got up at about 7.00 a.m. he noticed that his parents did not come home. Hence, at 7.30 a.m. he went towards river Banganga where the appellant and Kasabai used to go for fishing. On the way, P.W. 1 Deepak saw his mother Kasabai lying dead in the field of one Arun Date with injuries on her forehead and on the backside of the head. Then P.W. 1 Deepak lodged F.I.R.

5. The evidence of P.W. 1 Deepak and P.W. 7 Kunda who were the son and daughter of the appellant and the deceased, shows that the appellant used to suspect character of his wife Kasabai and he used to assault her. On the day of the incident, at about 8.00 p.m. a quarrel took place between the appellant and his wife Kasabai on account of appellant suspecting character of Kasabai. Two hours thereafter at about 10.00 p.m. the appellant and Kasabai left the house to go fishing however, they did not return back the next day early morning as usual and in fact, Kasabai was found dead on the way to the river Banganga. The evidence of these two witnesses brings out two circumstances, first circumstance is that of "motive" for the appellant to commit the crime and the second circumstance is "last seen". Motive has been brought on record by the prosecution through the evidence of P.W. 1 Deepak and P.W. 7 Kunda. Both have stated that the appellant used to suspect the character of his wife Kasabai and on the day of the incident also the appellant had quarreled with his wife Kasabai on the ground of suspecting her character.

6. As far as the second circumstance is concerned, the evidence of PW 1 Deepak and P.W. 7 Kunda shows that the deceased was last seen alive in company of the appellant while leaving their house at 10.00 p.m. In such case, the accused has to explain how Kasabai sustained injuries and died. In this connection, we may refer to Section 106 of the Evidence Act, Section 106 of the Evidence Act provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. In several recent decisions, the Supreme Court has held that the principles which underlie Section 106 of the Evidence Act can be applied in the context of the "last seen" theory when certain facts are especially within the knowledge of a person. In the State of Rajasthan Vs. Kashi Ram, , the Supreme Court has observed that if the accused fails to offer an

explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation as an additional link which completes the chain.

7. Ms. Rohini Dandekar then submitted that the case would not fall u/s 302 of IPC but it would fall u/s 304-II of IPC or at the most u/s 304-I of IPC. In order to base this submission, she has drawn our attention to the injuries which were sustained by Kasabai which are three contused lacerated wounds and two contused wounds. Ms. Dandekar submitted that though it is the prosecution case that the appellant assaulted Kasabai with a sickle, P.W. 4 Dr. Vaghmale has clearly stated that none of the injuries are possible by sickle. Thus, it has to be assumed that injuries were caused by stick. We agree with Ms. Dandekar's submission that the stick in this case is not such as can be called a deadly weapon.

8. Ms. Dandekar further submitted that the appellant had no intention to cause death as the incident occurred on the spur of the moment during which the appellant assaulted the deceased with a stick which was available at the spot. She submitted that there is no premeditation on the part of the appellant. Hence, looking to all these facts, the case would fall u/s 304 Part II of IPC as the appellant had no intention to cause death of Kasabai. The intention to cause death can be gathered generally from a combination of a few or several of the following among other circumstances:

- (i) nature of the weapon used;
- (ii) whether the weapon was carried by the accused or was picked up from the spot;
- (iii) whether the blow is aimed at a vital part of the body;
- (iv) the amount of force employed in causing injury;
- (v) whether the act was in the course of sudden quarrel;
- (vi) whether the incident occurred by chance or whether there was any premeditation;
- (vii) whether there was any prior enmity or whether the deceased was a stranger;
- (viii) whether there was any grave and sudden provocation, and if so, the cause of such provocation;

(ix) whether the accused dealt a single blow or several blows;

(x) whether the accused inflicting injury has taken undue advantage or has acted in a cruel and unusual manner;

The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention. In the present case, there is no material to show that any sudden quarrel took place between the appellant and the deceased. This is also not a case of grave and sudden provocation. It appears that there was no premeditation and the weapon i.e. stick was picked up from the spot. Looking to the injuries as deposed to by P.W. 4 Dr. Vaghmale, it can safely be said that the appellant had not intended to cause death of Kasabai.

The stick used in this case, is not such as to fall in the category of deadly weapon. Moreover, it is seen that first three injuries which were C.L.Ws. are only scalp deep with no underlying fracture. None of these three injuries was the cause of the death. Looking to the fact that injury Nos. 1 to 3 were caused with stick and there was no underlying fracture, it shows that the appellant did not use much force to assault Kasabai when he caused these injuries. Injury Nos. 4 and 5 are on the stomach region and both of them are contusions. The cause of death appears to be injury Nos. 4 and 5 which are contusions. These injuries caused internal damage which led to the death of Kasabai. If these injuries are seen externally, they do not appear to be such as to cause extensive internal damage. On external observation of injury Nos. 4 and 5 it cannot be said that the appellant intended to cause death. Looking to the nature of the injuries, weapon used and the force which was used by the appellant while causing injuries, we are of the opinion that the appropriate conviction in the present case would be u/s 304-II of IPC. Hence, we pass the following order.

ORDER

I) The appeal is allowed partly.

II) The conviction u/s 302 of IPC is set aside. Instead, the appellant is convicted u/s 304-II of IPC. For the said offence, he is sentenced to R.I. for eight years and fine of Rs. 500/- i/d R.I. for one month.

III) Office to communicate this order to the concerned prison Authorities and to the Appellant who is in jail.

IV) Writ of Order be expedited.

V) At this stage, we must record our appreciation for Smt. Dandekar appointed from the High Court Legal Services Committee Bombay, to represent the case of the appellant. We find that she had meticulously prepared the matter and she has very ably argued the matter. We quantify legal fees to be paid to her by the High Court Legal Services Committee at Rs. 2200/-. The said fees be paid to advocate Ms. Dandekar within three months from today.