

(2012) 12 BOM CK 0042

In the Bombay High Court

Case No : Criminal Appeal No. 765 of 2005

Rekha Rajendra Magar presently lodged at Yervada Central
Prison, Ladies Ward Pune

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 05-12-2012

Acts Referred:

Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 106
Penal Code, 1860 (IPC) — Section 302, 307, 309

Citation : (2013) 1 ABR 776 : (2013) ALLMR(Cri) 1737 : (2013) 2 BomCR(Cri) 440

Hon'ble Judges : V.K. Tahilramani, J;A.R. Joshi, J

Bench : Division Bench

Advocate : Shailesh Chavan, for the Appellant; S.A. Shaikh, Additional Public Prosecutor, for State, for the Respondent

Judgement

V.K. Tahilramani, J.—The appellant-original accused herein is a lady. She has directed this appeal against the judgment and order dated 31.10.2003 passed by learned Additional Sessions Judge, Satara in Sessions Case No. 143 of 2002. By the said judgment and order, learned Additional Sessions Judge convicted the appellant u/s 302, 307 and 309 of Indian Penal Code. For offence u/s 302 IPC, the appellant was sentenced to imprisonment for life and to pay a fine of Rs. 1000/- in default RI for one year. For the offence u/s 307 of IPC he was sentenced to RI for seven years and to pay a fine of Rs. 1000/- in default RI for one year. For the offence u/s 309 of IPC the appellant was sentenced to RI for one year and to pay fine of Rs. 300 in default to suffer RI for three months. Learned Sessions Judge directed the substantive sentences of imprisonment to run concurrently. The prosecution case, briefly stated, is as under :-

The appellant was married to PW-3 Rajendra on 7.12.1996. They had two children i.e. one daughter Komal, aged 3 years and one son Ranjit, who was

aged 10 months at the time of incident. The appellant was residing along with her husband PW-3 Rajendra, her mother-in-law PW-4 Kamal Magar and her children at Phaltan. PW-5 Anuradha was residing in the house adjoining the house of the appellant. On the day of the incident, PW-3 Rajendra left his house to go for work at about 10-30 am. His mother PW-4 Kamal left the house at about 11-00 am to go to the field for grazing sheep. Thereafter only the appellant and her two children were alone in the house. At about 2:30 pm, PW-5 Anuradha, neighbour of the appellant heard shouts of the children of the appellant, hence she went running to the house of the appellant. She called the appellant and asked her to open the door as the door was latched from inside. The appellant did not open the door. The appellant did not say anything from inside the house. PW-5 Anuradha gave call to Komal and asked her to open the door. On that Komal opened the door. When PW-5 Anuradha entered the house, she saw that appellant Rekha and Ranjit were lying in the house, yellowish foam was coming out of their mouth. There was a strong smell of some poisonous medicine. Anuradha lifted the small boy Ranjit and brought him outside the house. Anuradha took out his clothes and washed his body, because it was smelling of said poisonous medicine and was covered with vomit. She then took Ranjit to hospital. While she was giving wash to Ranjit, somebody had taken the appellant Rekha and Komal to the Government Hospital. When Anuradha reached the Government Hospital, Phaltan she saw the appellant Rekha and Komal were already inside the hospital. PW-6 PSI Govind Omase lodged FIR. Thereafter, investigation commenced. The appellant was in unconscious condition. Komal was also admitted in the hospital. However, condition of Ranjit was serious, hence it was advised that he be taken to a bigger hospital in Pune. Accordingly, PW-3 Rajendra left with Ranjit to go to Pune but Ranjit died on the way. The dead body of Ranjit was sent for postmortem. Postmortem notes shows that the cause of death was due to asphyxia due to organo phosphorous poisoning. No injury was seen on the dead body of Ranjit. Komal came to be discharged from the hospital after 17 days. After completion of investigation, charge sheet came to be filed.

2. Charge came to be framed against the appellant-original accused u/s 302 of Indian Penal Code for causing the murder of her son Ranjit, u/s 307 of IPC for attempting to commit murder of daughter Komal, charge was also framed u/s 309 of IPC against the appellant for attempting to commit suicide. The appellant pleaded not guilty to the said charges and claimed to be tried. Further defence of the appellant is that of total denial and false implication. Defence of the appellant is that her husband used to beat her and harass her. On the day of the incident her mother-in-law and her husband told her to go bank to withdraw the amount. She said to her mother-in-law that after preparing the food, she will go to the bank to withdraw the amount. Then the mother-in-law told the appellant that she will prepare food and sent the appellant to the bank to withdraw the amount. The appellant returned from the bank. She breast fed Ranjit. Thereafter, she and Komal consumed the food prepared by her mother-in-law. She fell unconscious. She does not know what happened thereafter. After going through the evidence

adduced by the prosecution as well as the defence raised by the appellant - original accused, learned Sessions Judge convicted and sentenced the appellant as stated in paragraph no. 1 above, hence this appeal.

3. We have heard learned Advocate for the appellant as well as learned A.P.P. for the State. After giving our anxious consideration to the facts and circumstances of this case, arguments advanced by the learned Advocates for the parties, the judgment delivered by the learned Sessions Judge and the evidence on record, we are of the opinion that learned Sessions Judge has rightly convicted and sentenced the appellant.

4. The prosecution is mainly relying on the evidence of PW-5 Anuradha, PW-3 Rajendra and PW-4 Komal. PW-5 Anuradha was the neighbour of the appellant. PW-3 is the husband of the appellant and father of deceased Ranjit and injured Komal and PW-4 is the mother-in-law of the appellant and grand-mother of Komal and Ranjit. PW-5 Anuradha has stated that she heard shouts. She heard shouts of the children of the appellant, hence she went running to the house of the appellant. She called the appellant and asked her to open the door as the door was latched from inside. The appellant did not open the door. The appellant did not say anything from inside the house. PW-5 Anuradha gave call to Komal and asked her to open the door. On that Komal opened the door. When PW-5 Anuradha entered the house, she saw that the appellant Rekha and Ranjit were lying in the house, yellowish foam was coming out of their mouth. There was a strong smell of some poisonous medicine. Anuradha lifted the small boy Ranjit and brought him outside the house. She took out his clothes and washed his body, because it was smelling of said poisonous medicine and it was covered with vomit. She then took Ranjit to the hospital. While she was giving wash to Ranjit, somebody had taken the appellant Rekha and Komal to the Government Hospital. When Anuradha reached the Government Hospital, Phaltan she saw the appellant Rekha and Komal were already inside the hospital. Thus, the evidence of this witness shows that the door of the house was locked from inside and at the relevant time only the appellant, her daughter Komal and Ranjit, who died later were in the house. There was no other person in the house.

5. PW-5 Anuradha has been cross-examined at length by the defence counsel but nothing has come in the cross-examination except her version that earlier to the incident she did not hear the sound or cry of children of Rekha from her house at any time. Mr Chavan, learned advocate for the appellant submitted that if this witness did not hear any sound of cry of the appellant's children earlier it meant that on the day of the incident she could not have heard cry of children of the appellant. He submitted that in such case her version that at the time of the incident she heard cry of the children from the house of the appellant cannot be believed. As far as this aspect is concerned on other occasion Anuradha may not have heard the children crying in normal circumstances but in the present case as the children had been administered poison they would be in a severe agony, hence, their cries are bound to be louder and at a higher pitch than usual,

therefore, they were capable of being heard. It is pertinent to note that the appellant Rekha did not raise any cries. This shows she did not want to seek help and she wanted herself and her children to die. Thus, we find no merit in this contention. Moreover, it is to be noted that this witness is not related to the appellant. Nothing has been brought on record that she had any enmity with the appellant or any grudge against the appellant. On going through the entire deposition of this witness we find that her testimony inspires confidence, therefore, we can safely rely on her testimony.

6. Thus, the evidence of PW-5 Anuradha clearly shows that at the relevant time the appellant Rekha along with her two children i.e. Komal and Ranjit were the only persons inside the house. The house was locked from inside and when the door was opened by Komal, at that time only the appellant Komal and Ranjit were found in the house. It is also to be noted that in statement u/s 313 of Cr.P.C. Rekha has admitted that her husband and mother-in-law had left the house and she was alone in the house with her children, Ranjit and Komal.

7. The evidence of PW-3 Rajendra, husband of the appellant and father of Komal and Ranjit shows that he left the house at 10-30 a.m. to go to work. The evidence of PW-4 Komal shows that she left the house at 11-00 a.m. in order to graze sheep in the field. The evidence on record also shows that there was smell in the house like insecticide which is used to sprinkle on crops. Poison was found in the viscera of deceased Ranjit and on the clothes of Komal as well as the appellant.

8. The appellant tried to raise the defence that her mother-in-law had prepared food that day and she and Komal consumed the food. Thereafter, she became unconscious. However, in the statement u/s 313 the appellant has stated that she was breast feeding her ten months old child Ranjit. This means that Ranjit had not consumed food allegedly prepared by mother-in-law of the appellant. It is pertinent to note that poison was also found in the body of Ranjit which was meant for spraying crops. This clearly shows that Ranjit was also administered poison. In the house there were only three persons. All of them were found to have consumed poison. Ranjit was just ten months old. In such case, he could not have consumed poison himself nor could Komal, who was a girl of three years administer poison to Ranjit. In such case only person in the house capable of administering poison to both the children was the appellant. This leads to the inescapable conclusion that the appellant administered poison to Ranjit and Komal and to herself. Defence of the appellant cannot be believed because Ranjit was also found to have been consumed poison. Though according to the appellant he had not consumed food prepared by her mother-in-law. The case of the appellant is that her mother-in-law prepared food which she and Komal consumed. Thereafter, she became unconscious yet Ranjit was also found to have been poisoned.

9. The evidence on record clearly shows that the appellant only and her two minor children were in the house at the time of the incident. However, none of

the defences which have been put forth by the appellant for the death of her son Ranjit are found credible. Section 106 of the Evidence Act provides that when any fact is within the special knowledge of any person, the burden of proving that fact is upon the person. The appellant was very much present in the house along with minor children. In such case, she must offer an explanation as to how Ranjit died. She must furnish an explanation which appears to the court to be probable and satisfactory. If she does so, she must be held to have discharged her burden. If she fails to offer an explanation on the basis of facts within her special knowledge, she fails to discharge the burden cast upon her by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if an accused fails to offer any reasonable explanation in discharge of the burden placed on him/her that itself provides an additional link in the chain of circumstances proved against him/her. Section 106 does not shift the burden of proving in a criminal trial which is always upon the prosecution. It lays down the rule that when the appellant does not throw any light upon the facts which are established within his/her knowledge and which could not support any theory or hypothesis compatible with his/her innocence, the court can consider such failure to adduce any explanation as an additional link which completes the link. In the present case, the appellant has tried to raise the defence that on the day of the incident she had consumed the food which her mother-in-law had prepared. We have already discussed above that the defence of the appellant is not found to be credible. We find absolutely no merit in the defence taken by the appellant. Thus, it is seen in the present case that the appellant has not furnished any plausible explanation for the death of her son Ranjit. This, in our view, completes the link which completes the link of circumstantial evidence against the appellant.

10. Thereafter, the learned Advocate for the appellant submitted that the case would not fall u/s 302 because the appellant did not have the intention of causing death of her child. As far as this aspect is concerned, it is noticed that Ranjit was just ten months old at the time of the incident. He was made to consume a large amount of poison. This clearly shows that intention of the appellant was to cause death of Ranjit. After being admitted in hospital for about 17 days and after receiving treatment in hospital fortunately Komal survived. Looking to this fact we are of the opinion that case u/s 307 is also made out, hence the conviction and sentence of the appellant u/s 302 and 307 of IPC has to be maintained.

11. This leaves us with the conviction of the appellant u/s 309 IPC. As far as section 309 is concerned, it is to be noted that the Supreme Court in the decision in the case of P. Rathinam/Nagbhusan Patnaik Vs. Union of India and another, laid down that Section 309 of IPC violates Art.21 of the Constitution of India and so it is void. It is pertinent to note that however, the decision in the case of P. Rathinam (supra) was over ruled by the Supreme Court by the decision in the case of Smt. Gian Kaur Vs. State of Punjab, . In the decision in the case of Gian Kaur (supra) the Supreme Court held that Section 309 of IPC i.e. to attempt to commit suicide is constitutionally valid. In a recent decision of the Supreme

Court in the case of Gangula Mohan Reddy Vs. State of Andhra Pradesh, , the Supreme Court upheld conviction of the accused u/s 309 of IPC. However, as far as the sentence imposed upon the appellant u/s 309 of IPC is concerned, we would like to refer to the decision of the Supreme Court in the case of Aruna Ramachandra Shanbaug Vs. Union of India (UOI) and Others, . In the said decision, it is observed as under :-

103. "We are of the opinion that although Section 309 of the Penal Code (attempt to commit suicide) has been held to be constitutionally valid in Gian Kaur case, the time has come when it should be deleted by Parliament as it has become anachronistic. A person attempts suicide in depression, and hence he needs help, rather than punishment. We, therefore, recommend to Parliament to consider the feasibility of deleting Section 309 from the Penal Code.

In view of these observations, we up hold the conviction of the appellant u/s 309 of IPC, however, we are inclined to reduce the sentence of imprisonment. In view of the above, the following order is passed.

ORDER

(1) The conviction and sentence of the appellant under sections 302 and 307 of IPC is maintained. The conviction of the appellant u/s 309 of IPC is also maintained. However, the sentence is reduced from RI for one year to SI for one week and fine of Rs. 50/- in default SI for one week.

(2) Appeal partly allowed in above terms.

(3) Writ of order be expedited.

(4) Office to communicate this order to the appellant who is in jail.