

(2015) 08 BOM CK 0260
In the Bombay High Court
Case No : Criminal Appeal No. 201 of 2013

Ritesh Gulabrao Dhabekar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 24-08-2015

Acts Referred:

Evidence Act, 1872 — Section 103, 106, 27
Penal Code, 1860 (IPC) — Section 201, 302, 34

Citation : (2015) 08 BOM CK 0260

Hon'ble Judges : B.R. Gavai, J;P.B. Varale, J

Bench : Division Bench

Advocate : R.M. Daga, for the Appellant; D.P. Thakre, APP, Advocates for the Respondent

Final Decision : Allowed

Judgement

B.R. Gavai, J—The appeal challenges the judgment and order passed by the learned Ad-hoc Additional Sessions Judge-4, Nagpur in Sessions Trial No. 47 of 2012 thereby convicting the appellant for the offence punishable under Section 302 of the Indian Penal Code and sentencing him to suffer imprisonment for life and to pay fine of Rs. 2000/- and in default of payment of fine to suffer rigorous imprisonment for 2 months and also convicting him for the offence punishable under Section 201 read with 34 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 3 years and to pay fine of Rs. 1000/- and in default of payment of fine to suffer rigorous imprisonment for 1 month.

2. The prosecution story as could be gathered from the material placed on record is thus:-

On 11.07.2011 PW13 Kamalsing Bawari informed Butibori Police Station that dead body of a woman was found lying in the river water at Vena river. Entry in respect of the said information was made in the record of the Police Station Butibori. Thereafter P.S.I. PW14 Suresh Bhojar visited the spot. He found the dead body of woman floating in the river water. With the help of 2-3 persons, the

dead body was brought on the bank of river. The dead body was half naked below waist. One cloth had been tied over the neck of dead body. Both the legs of the dead body had been tied by folding at knees. Since the identity of the deceased was not known, PW14 Suresh Bhoyar prepared crime detail form and spot panchanama in the presence of panch witnesses. Thereafter inquest panchanama of the dead body of said woman was also prepared in the presence of three panch witnesses. The dead body was sent to Government Medical College and Hospital, Nagpur along with the necessary information for post-mortem.

3. On the same day, PW14 lodged his report in writing about the same before Police Inspector Butibori. Crime No. 129 of 2011 came to be registered for the offence punishable under Section 302 read with 201 of the I.P.C. against unknown person. Information was sent to all the Police Stations in Nagpur rural area for search of the culprit and getting information about the deceased. Police Head Constable PW16 Devidas Satange visited the surrounding areas. When he visited village Tembhri, on making inquiry he came to know from the villagers that accused Ritesh Dhabekar was residing in village Tembhri in the rented premises. It was also informed that he was residing there along with one woman. However, the said woman was missing for the last 2 days prior to the incident. Accordingly PW16 submitted a detailed report to Police Station Officer Butibori on 12.07.2011. The appellant was brought to the Police Station by PW16 for the purposes of investigation. After interrogation finding his involvement in the crime, the offence came to be registered. While in custody, a memorandum of the appellant under Section 27 of the Indian Evidence Act came to be recorded. It is the prosecution case that in the said memorandum, the appellant had admitted of committing the crime with the help of one Deva @ Digambar Maroti Sewatkar. It is the prosecution case that in the said memorandum, the appellant had admitted that after dashing the head of the deceased against wall, he had strangled her and thereafter with the help of accused no. 2 had brought the dead body of the deceased in a plastic sack and thrown the same in Vena river. It is also the prosecution case that on the basis of the said memorandum, motorcycle bearing registration No. MH-40-S-7811 also came to be seized. After conclusion of the investigation, a charge sheet came to be filed in the Court of the learned Judicial Magistrate First Class, Nagpur. Since the case was exclusively triable by the Sessions Judge, the same came to be committed to the learned Sessions Judge, Nagpur. Since the accused no. 2 was absconding, the trial came to be separated and the trial proceeded only against the present appellant.

4. Charges came to be framed for the offence punishable under Sections 302, 201 read with 34 of the Indian Penal Code. The appellant pleaded not guilty and claimed to be tried. At the conclusion of the trial, the learned trial Judge passed the order of conviction and sentenced the appellant as aforesaid. Being aggrieved thereby, the present appeal is filed.

5. Mr. R.M. Daga, learned counsel appearing on behalf of the appellant submits

that the order of conviction and sentence as passed by the learned trial Judge is wholly on the basis of the conjectures and surmises. The learned counsel submits that the prosecution has failed to establish even a single incriminating circumstance to leave aside establishing the chain of proven circumstances which leads to no other conclusion than the guilt of the accused. He submits that even there is no material on record to establish that the appellant and the deceased were residing together. He submits that except the hearsay evidence of PW16, which is not admissible in law, there is no material to establish beyond reasonable doubt that the appellant and the deceased were residing together. In any case he submits that there is no material placed on record to show that the deceased and the appellant were last seen together in the company of each of them and thereafter within a short period the death has taken place. The learned counsel, therefore, prays for allowing the appeal and acquitting the accused.

6. Mr. D.P. Thakre, learned Additional Public Prosecutor on the contrary submits that the present case would fall under Section 106 of the Indian Evidence Act. He submits that the evidence of PW7 Manda Kamatkar and PW8 Govind Tekade would clearly establish that the deceased and the appellant were residing together as husband and wife. He submits that when the deceased and the appellant were residing as husband and wife, the circumstance that though the deceased was absconding for a period of two days, the appellant has not lodged any report fortifies the case against the appellant. The learned APP submits that apart from that the memorandum under Section 27 of the Indian Evidence Act clearly establishes the guilt of the appellant. The learned APP, therefore, prays that the appeal deserves to be dismissed.

7. In the present case, the learned counsel for the appellant has not disputed that the death of the deceased is homicidal and as such we need not to consider the medical evidence or the evidence of Chemical Analyser as to whether the prosecution has proved beyond reasonable doubt that the death of the deceased is homicidal or not. The only question that we are called upon to answer is as to whether the prosecution has proved beyond reasonable doubt that the present appellant is the author of the crime or not.

8. Undisputedly the present case is a case based entirely on circumstantial evidence. The Apex Court in the case of Sharad Birdhichand Sarda Vs. State of Maharashtra, AIR 1984 SC 1622 : (1984) CriLJ 1738 : (1984) 2 SCALE 445 : (1984) 4 SCC 116 : (1985) 1 SCR 88 has observed thus :-

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:-

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical

but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra, AIR 1973 SC 2622 : (1973) CriLJ 1783 : (1973) 2 SCC 793 : (1973) SCC(Cri) 1033 : (1974) 1 SCR 489 where the following observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be" and "must be" is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

It could thus be seen that the Apex Court has clearly held that the prosecution is required to prove each and every circumstance beyond reasonable doubt. Not only that the prosecution is required to prove that each and every incriminating circumstance was proved forming a chain so complete which leads to no other conclusion than the guilt of the accused. The Apex Court has further held that however a strong suspicion be, does not take away a case beyond reasonable doubt. The Apex Court has further held that every possible hypothesis excluding the guilt of the accused, has to be ruled out before resting the conviction on the basis of the circumstantial evidence. In the light of these guiding circumstances, we will have to examine the material placed on record.

9. The learned trial Judge has basically relied on the evidence of PW16 Head Constable Devidas Satange to come to the conclusion that the prosecution has proved that the deceased and the appellant were residing together as husband and wife and, therefore, the burden lied upon the appellant under Section 106 of the Indian Evidence Act to explain as to what had happened to the deceased. PW16 in his evidence has stated that when he went to village Tembhri, he came to know that in the premises of Laxman Ramchandra Ade, the present appellant was residing as a tenant along with Ashwini. He stated that he had shown the photograph of the deceased to some persons in the village. Those persons identified the photograph to be of Ashwini and informed that since last two days prior to her death, she was absconding. He stated that thereafter he became

suspicious about the present appellant and caught him and brought him to the Police Station. He submitted that during the said inquiry, Ganesh Kawaduji Kotgale and Nikesh Shamrao Nandeshwar had been inquiring about the same. It could thus be clearly seen that the said witness does not have a personal knowledge about the deceased and the appellant residing together. Knowledge is based upon the statements given to him by Ganesh and Nikesh. Out of the two, Nikesh has been examined as PW6. His evidence is at Exh.17. The said witness turned hostile and has not supported the prosecution case.

10. The prosecution has also examined Manda as PW7, the mother of the deceased. She has stated in her evidence that the deceased was missing for last about 8 months. She has stated in examination-in-chief that she does not know where she had gone but subsequently came to know that she had died. She has identified the clothes of the deceased which are found in the room taken on rent by the appellant. However, from her cross-examination it will be clear that she has admitted that the deceased had run away with Jitu Bhalavi. She has further admitted that deceased resided with said Jitu for a month. Thereafter she had brought Ashwini to her room. She has further stated that she had prosecuted Jitu Bhalavi. She has expressed her ignorance about the fact as to whether thereafter her daughter had run away with Ravi Tekade. However, she has admitted that even on second occasion her daughter had run away from her house. She has further admitted that when she was contacting her daughter on telephone, she was not receiving her telephone. She has further admitted that after her daughter ran away with Jitu Bhalavi, she had not lodged complaint immediately about the same.

11. PW8 Govind Tekade is the brother of one Ravi. He states in his evidence that prior to the incident the appellant was residing along with Ravi, brother of this witness. He has further stated that Ravi was residing with Ashwini. He states that he had received telephone message that there was dispute between Ravi and Ashwini and Ashwini was not ready to reside with Ravi. He states that Ravi called him to meet them. Thereafter he suggested to prepare Sodchitthi of Ashwini and Ravi. He purchased a stamp paper at Hingna and got prepared the document of Hamipatra. The said document is signed by Ashwini, Ravi, Ritesh and PW8. He states that thereafter he left his brother Ravi to his place. He further states that Ashwini was residing thereafter with Chotu.

12. From the evidence of these two witnesses, at the most what can be said to be proved by the prosecution is that initially the deceased had eloped with Jitu, thereafter with Ravi and after there was separation between her and Ravi, she started residing with the appellant. However, the prosecution has not brought any evidence on record to establish that prior to the incident the deceased and the appellant were residing together. The hearsay evidence of PW16 would not be sufficient to establish the said circumstance. No doubt that the circumstance of the deceased and the appellant last seen together and thereafter the death of the deceased occurring in a short period would be a strong circumstance against

the appellant. It will be relevant to refer to the following observations of the Apex Court in the case of Ramreddy Rajeshkhanna Reddy and Another Vs. State of Andhra Pradesh, AIR 2006 SC 1656 : (2006) 4 JT 16 : (2006) 3 SCALE 452 : (2006) 10 SCC 172 : (2006) AIRSCW 1602 : (2006) 3 Supreme 175 :-

"The last-seen theory, furthermore comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case Courts should look for some corroboration."

It could thus be seen that the Apex Court has in clear terms held that last seen theory would come into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. In the present case it could be seen that leave apart establishing that the time gap between the deceased and the appellant last seen together in the company of each other and the time of the death of the deceased occurring is very short, the prosecution has failed to establish that the deceased and the appellant were last seen together. Evidence of PW7 and PW8 would not throw light as to in which period the deceased and the appellant were residing together. As already discussed hereinabove, the evidence of PW16 which is an hearsay evidence cannot be said to be sufficient enough to establish the said circumstance beyond reasonable doubt.

13. Insofar as the observation of the learned trial Judge that the case would fall under Section 106 of the Indian Evidence Act and the burden lied on the appellant is concerned, by now it is a settled law that initially the burden is required to be discharged by the prosecution. Only after the prosecution discharges the burden which lies on it, the burden would shift upon the person who is alleged to have a special knowledge. The reliance in this respect could be made on the following observations of the Apex Court in the case of Sawal Das Vs. State of Bihar, AIR 1974 SC 778 : (1974) CriLJ 664 : (1974) 4 SCC 193 : (1974) SCC(Cri) 362 : (1974) 3 SCR 74 :-

"9. Learned Counsel for the appellant contended that Section 106 of the Evidence Act could not be called in aid by the prosecution because that Section applies only where a fact relating to the actual commission of the offence is within the special knowledge of the accused, such as the circumstances in which or the intention with which an accused did a particular act alleged to constitute an offence. The language of Section 106 Evidence Act does not, in our opinion, warrant putting such a narrow construction upon it. This Court held in Gurcharan Singh and Another Vs. State of Punjab, AIR 1956 SC 460 : (1956) CriLJ 827 that the burden of proving a plea specifically set up by an accused, which may absolve him from criminal liability, certainly lies upon him. It is a different matter that the quantum of evidence by which he may succeed in discharging his burden of creating a reasonable belief, that circumstance absolving him from criminal

liability may have existed, is lower than the burden resting upon the prosecution to establish the guilt of an accused beyond reasonable doubt.

10. Neither an application of Section 103 nor of 106 of the Evidence Act could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or, which makes out a prima facie case, that the question arises of considering facts of which the burden of proof may lie upon the accused. The crucial question in the case before us is : as the prosecution discharged its initial or general and primary burden of proving the guilt of the appellant beyond reasonable doubt? "

14. As already discussed hereinabove that the prosecution has utterly failed to establish that the appellant and the deceased were last seen together leave apart establishing that the time gap between the deceased and the appellant last seen together in the company of each other and the time of the death of the deceased occurring is very narrow.

15. That leaves us with the circumstance regarding the memorandum under Section 27 of the Indian Evidence Act. By now it is a settled principle of law that the confession made to the Police Officer is not admissible in evidence. The only such of the information which relates distinctly to the fact discovered on the basis of the information received from the accused under Section 27 can be used against him. However, the confession made under Section 27 would not be admissible in evidence. At the most the information which leads to the recovery of a motorcycle in the memorandum which is at Exh.35, can be used against him. However, the recovery of the motorcycle itself would not be a circumstance which would be sufficient to prove the guilt of the accused. Similarly the seizure of the clothes from the house of the appellant which is said to have been the clothes of the deceased, cannot be a circumstance sufficient to rest the order of conviction. Insofar as the alleged seizure is concerned, the same is also not on the memorandum of the accused. As such the said circumstance would also be of not much assistance to the prosecution case.

16. In the totality of the circumstances, we find that the prosecution has failed to prove the case beyond reasonable doubt. The order of conviction is not sustainable in law. Insofar as the conviction under Section 201 of the I.P.C. is concerned, we find that the conviction under Section 201 is also similarly on the basis of the confession of the appellant in his memorandum statement under Section 27 of the Indian Evidence Act. As such the same would also not be sustainable in law.

17. The appeal is, therefore, allowed. The judgment and order of conviction passed by the Ad-hoc Additional Sessions Judge-4, Nagpur, dated 24.08.2012 in Sessions Trial No. 47 of 2012 is hereby set aside. The appellant is directed to be set at liberty forthwith, if not required in any other case.