

(2018) 02 BOM CK 0101
In the Bombay High Court
Case No : 101 of 2017

Sagar Bhagwat Gawande

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 28-02-2018

Acts Referred:

Code of Criminal Procedure, 1973, Section 313 - Power to examine the accused
Indian Penal Code, 1860, Section 302 - Punishment for murder
Evidence Act, 1872, Section 106 - Burden of proving fact especially within knowledge

Citation : (2018) 02 BOM CK 0101

Hon'ble Judges : R.K.Deshpande, M.G.Giratkar

Bench : Division Bench

Advocate : S.D.Chande, Dr.U.K.Kalsi, T.H.Udeshi

Final Decision : Allowed

Judgement

1. Appellant has challenged the Judgment of conviction awarded by Additional Sessions Judge, Khamgaon for the offence punishable under Section 302 of the Indian Penal Code, by which he is sentenced to undergo imprisonment for life and to pay a fine of Rs.500/in default to suffer rigorous imprisonment for six months.

2. The case of prosecution against the appellant, in short, is as under :

Deceased Archana was married with the appellant on 25.1.2012. Appellant gave good treatment to her for a period of two months after the marriage. Thereafter, appellant, his mother and sister started illtreating her on account of demand of money from her parents. They were beating and physically illtreating her. Two months before the incident, appellant reached the deceased to the house of her parents. Appellant directed deceased to bring Rs.30,000/to Rs.40,000/else she should not come to his house. Deceased Archana resided with her parents for

about 78 days. Thereafter, their relative namely Baliram Satpute compromised the matter. Father of appellant agreed to give some amount at the time of Dipawali. They reached the deceased to the house of appellant.

3. On 29.9.2012, appellant and deceased came to the house of her parents. At that time, deceased Archana informed her parents that her motherinlaw, sister and husband used to beat her on account of demand of money. In the night of 2.10.2012, at about 00.30 a.m., appellant informed the father of deceased that he had quarrelled with the deceased. He pressed her neck. She became unconscious. He was requested to come immediately.

4. Appellant also informed Police Station, Jalgaon Jamod in the night of 2.10.2012 at about 00.55 a.m. that he had quarrelled with his wife Archana. He pressed her neck. She was unconscious. Staff of Police Station, Jalgaon Jamod went to village PimpalgaonKale. Accused met on the road at about 1.00 a.m. He took the police to his house. They saw the deceased lying on the cot. Police took the deceased to hospital. Medical Officer examined her and declared dead. Early in the morning, father of deceased reached to Police Station, Jalgaon Jamod and lodged report.

5. API Sheshrao Laxmanrao Nitnavare (PW10) investigated the crime, sent dead body for post mortem and recorded statement of witnesses. After complete investigation, he filed charge sheet before the Judicial Magistrate, First Class. As usual, the case was committed for trial to the Additional Sessions Judge, Khamgaon.

6. Charge was framed at Exh.32 against the appellant, his mother and sister. They denied the charge. Prosecution has examined the following witnesses :

a.Bhaskar Tulshiram Avchar (PW1) (Exh.37).

b.Malu Ramesh Mapari (PW2) (Exh.39).

c,Ramesh Ramdhan Mapari (PW3)(Exh.42).

d.Dinkar Ramchan Mapari (PW4) (Exh.45).

e.Gajanan Rambhau Kokate (PW5) (Exh.46).

f.Baliram Janrao Satpute (PW6) (Exh.48).

g.Manohar Kundlik Kolhe (PW7) (Exh.49).

h.Dr.Amol Madhukar Banait (PW8)(Exh.52).

i.Murlidhar Chandrabhan Patil (PW9) (Exh.57).

j.Sheshrao Laxmanrao Nitnavare (PW10) (Exh.58).

7. Statement of appellant was recorded u/s. 313 of Code of Criminal Procedure. Appellant denied the case of prosecution. Learned trial Court, after hearing the prosecution and defence, convicted the appellant, as stated above and acquitted

his mother and sister. Hence, the appellant filed the present appeal.

8. Heard Mr.S.D.Chahande, learned Counsel holding for Mrs.U.K.Kalsi, learned Counsel for the appellant. He has submitted that there is no evidence against the appellant to show that he has committed murder of his wife. All the material witnesses have not supported prosecution. They have not stated anything against the appellant. Learned trial Court wrongly recorded its finding holding that deceased was in the custody of appellant and therefore, wrongly convicted him.

9. Learned Counsel for the appellant has submitted that prosecution has not adduced any evidence to show any physical cruelty committed by the appellant against his wife. Initially, burden of proof is on the prosecution to adduce sufficient evidence pointing towards guilt of the accused. Accused was last seen together with the deceased. But proof in respect of last seen together itself is not conclusive proof, but along with it, the other circumstances surrounding the incident like relations between accused and deceased, enmity between them, previous history of hostility, recovery of weapon from accused, nonexplanation of death of deceased etc. may lead to presumption of guilt of accused. Prosecution has not adduced any clinching evidence in support of last seen together theory and therefore, failed to prove the guilt of appellant. In support of his submission, the learned Counsel pointed out decision in the case of Ashok vs. State of Maharashtra, (2015) 4 SCC 393 . There is no evidence against the appellant. Circumstantial evidence is also not proved. At last, it is submitted that prosecution has failed to prove guilt of appellant. Hence, appeal be allowed, as prayed.

10. Heard Ms T.H.Udeshi, learned A.P.P. for the respondent/State. She has submitted that deceased was in the custody of appellant. It was for him to explain as to how she died. Learned trial Court has rightly convicted the appellant. Hence, appeal is devoid of merits and liable to be dismissed.

11. Bhaskar Avchar (PW1), neighbour of appellant has stated in his evidence that his house is adjacent to the house of accused. Matrimonial relations between appellant and his wife were cordial. He has not stated anything more.

12. Malu Mapari (PW2) has stated in her evidence that deceased was her daughter. After the marriage of deceased, motherinlaw and sisterinlaw gave trouble to her. She has also not supported the prosecution. Ramesh Mapari (PW3) has stated in his evidence that deceased was his daughter. He lodged report but denied the contents. He has stated that deceased was leading a happy married life with the accused and accused were treating her properly till her death.

13. Dinkar Mapari (PW4) has stated that deceased was his niece. He had no knowledge about the marital life of deceased. She never told him about the illtreatment. He has not supported the prosecution. Gajanan Kokate (PW5) has stated that spot panchanama (Exh.47) was not prepared in his presence. Baliram

Satpute (PW6) has stated that marital life of appellant and deceased was well. Deceased Archana never complained him about illtreatment. This witness has also not supported prosecution.

14. All the material witnesses including father, mother and relatives of deceased i.e. Bhaskar Avchar (PW1), Malu Mapari (PW2), Ramesh Mapari (PW3), Dinkar Mapari (PW4), Gajanan Kokate (PW5) and Baliram Satpute (PW6) have not supported prosecution. They were declared hostile and crossexamined by prosecution. But, nothing is brought on record to show that there was any illtreatment by the appellant, his mother and sister.

15. Police Head Constable Manohar Kolhe (PW7) has stated that deceased Archana lodged report on 1.10.2012 against her motherinlaw and daughterinlaw stating that both beat her.

16. Dr.Amol Banait (PW8) has stated in his evidence that, on 2.10.2012, he had conducted post mortem on the dead body of Archana and found five injuries. As per his opinion, deceased died due to ligature strangulation. Panch witness Murlidhar Patil (PW9) has not supported prosecution. He has denied about the spot panchanama etc.

17. API Nitnaware (PW10) has stated in his evidence that, on 2.10.2012, at about 1.00 a.m., he along with Police staff went to village Pimpalgaon Kale at the house of Police Patil. While they were going to the house of appellant, he met them near Shivaji Statute. They asked him whether he was the same person who had given information about the incident. He replied in the affirmative. So they took with them and went to his house. In his house wooden cot of size 4 x 6 ft. was there. Deceased was lying on that cot facing upward. With the help of appellant and others, they brought that lady to the Medical hospital, Jalgaon Jamod. Medical Officer declared her dead. He arrested the appellant. On the next day morning, father of deceased lodged report.

18. From the perusal of Judgment, learned trial Court has recorded its finding in para no.36 that appellant did not offer any explanation as to how deceased Archana received ligature strangulation. Learned trial Court relied on the Station diary entry (Exh.67) in which it is written that appellant had given information that he quarreled with his wife, pressed his neck and therefore, she was unconscious. On the basis of this evidence i.e. Station Diary entry, learned trial Court convicted the appellant. Learned trial Court acquitted mother and sister of appellant for the offences charged against them.

19. There is no evidence by parents of deceased or any other witness against the appellant to show that there was any cruelty, beating etc. Bhaskar Avchar (PW1), Malu Mapari (PW2), Ramesh Mapari (PW3), Dinkar Mapari (PW4), Gajanan Kokate (PW5) and Baliram Satpute (PW6) have not supported prosecution. Nearest relatives of appellant i.e. Mother, father, uncle and neighbour of appellant have not stated a single word against the appellant.

20. Malu Mapari (PW2), mother of deceased has stated in evidence that there was trouble by the mother and sister of appellant to the deceased. She has not stated anything against the appellant. On the other hand, mother and father of deceased have specifically stated that appellant was treating his wife/deceased well till her death. There is no other evidence brought on record by prosecution.

21. Learned trial Court has wrongly relied on the Station diary entry. As per the Station Diary entry (Exh.67), information was given by the appellant to the police stating that he had quarreled with his wife and he pressed her neck. It amounts to confession by the appellant about his guilt. Therefore, any confession given to police by the appellant (accused) stating that he had quarreled with his wife and he pressed her neck is not admissible in view of Sections 25 and 26 of the Indian Evidence Act. API Sheshrao Nitnavare (PW10) has only stated that information was recorded in Station diary, but he has also not stated about the contents.

22. There is no other evidence to show that deceased was in the custody of appellants at the time of incident.

23. Bhaskar Avchar (PW1) has stated that his house is adjoining to the house of appellant/accused. He has stated that matrimonial relations between appellant and his wife were cordial. In the night of incident, he was present in his house. But he has not stated that accused/appellant was present in the house and he saw the deceased with the appellant. Therefore, there is no evidence to show that appellant was lastly in the company of deceased. Burden of proof is on the prosecution to adduce sufficient evidence pointing towards guilt of accused. Thereafter, burden shifts on the accused u/s.106 of the Evidence Act. Hon'ble Supreme Court in the case of Ashok .vs. State of Maharashtra (supra) has held as under : "Initial burden of proof is on prosecution to adduce sufficient evidence pointing towards guilt of accused. However, in case it is established that accused was last seen together with deceased, prosecution is exempted to prove exact happening of incident as accused himself would have special knowledge of incident and thus, would have burden of proof as per Section 106 of Evidence Act. But, last seen together itself is not conclusive proof but along with other circumstances surrounding the incident, like relations between accused and deceased, enmity between them, previous history of hostility, recovery of weapon from accused, etc. Nonexplanation of death of deceased etc. may lead to presumption of guilt of accused. Herein, prosecution has not adduced any clinching evidence in support of last seen together theory so as to shift burden of proof onto appellant/accused. Hence, guilt of appellant/accused is not proved. "

"Prosecution has not adduced any clinching evidence in support of last seen together theory, so as to shift burden of proof onto appellant. As prosecution has evidently failed to discharge its initial burden of proving guilt of appellant itself, therefore, question of burden of proof shifting to appellant to explain happening of incidents does not arise. Thus, Section 106 of Evidence Act is not attracted. Appellant had put up a very consistent defence story at all stages of case without

any inconsistency. Hence, High Court's Judgment upholding conviction of appellant is set aside. "

24. Prosecution has not adduced any evidence to show that, in the night of incident, appellant was in the company of deceased and he committed murder of his wife. Nearest relatives of deceased i.e. Father, mother, uncle and neighbour of appellant have not supported the prosecution. They have not stated any single instance of cruelty by the appellant. On the other hand, they have stated that relations of appellant with the deceased were cordial till her death. Learned trial Court has wrongly relied on the Station diary entry (Exh.67) and only on that basis, wrongly convicted the appellant without any evidence on record against the appellant. Finding recorded by the learned trial Court is perfectly illegal. Therefore, appellant is entitled for acquittal. Hence, we proceed to pass the following order. // ORDER //

The appeal is allowed.

The impugned Judgment is hereby quashed and set aside. Appellant is hereby acquitted of the offence punishable under Section 302 of the Indian Penal Code.

Appellant is in jail. He be released forthwith if not required in any other crime or case.

The record and proceedings be sent back to the trial Court.