
(2013) 06 BOM CK 0090
In the Bombay High Court
Case No : Criminal Appeal No. 473 of 2009

Sambhaji

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 25-06-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 174
Evidence Act, 1872 — Section 103, 106
Penal Code, 1860 (IPC) — Section 201, 302, 306, 34, 498A

Citation : (2013) 6 ABR 120 : (2013) ALLMR(Cri) 2835

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

Bench : Division Bench

Advocate : S.P. Gadling, for the Appellant; T.A. Mirza, Additional Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

B.R. Gavai, J.—The present Criminal Appeal takes exception to judgment and order dated 31.3.2009, passed by the learned Ad-hoc Additional Sessions Judge-1, Chandrapur, in Sessions Case No. 113 of 2008, thereby convicting the appellant for the offence punishable u/s 302 of the Indian Penal Code and sentencing him to suffer imprisonment for life and to pay a fine of Rs. 2000/-, in default to suffer rigorous imprisonment for two months; and for the offence punishable u/s 201 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for one year and to pay a fine of Rs. 500/-, in default to suffer rigorous imprisonment for one month. The case of the prosecution in nut-shell is as under:

The appellant-Sambhaji s/o Chindhuji Pachare had given information to the Police Station, Ghuggus, that on 5.6.2006 at about 4.00 am, his wife - Shalu was seen burning in the house near the cot and in the said incident in which his wife died. On the basis of the said information, Incharge of the Police Station, Ghuggus, registered accidental death bearing No. 16 of 2006 u/s 174 of the

Criminal Procedure Code. During the investigation it was gathered, that on the day of incident, on 4.6.2006 at about 8.00 pm, the appellant/accused - Sambhaji, his deceased wife - Shalu, and his two sons Ajay and Rupesh had their meals. It is the prosecution case that at that time the appellant/accused - Sambhaji was drunk and deceased wife and appellant/accused - Sambhaji had a quarrel in which appellant/accused - Sambhaji had given first blow. On 5.6.2006, in between 4.30 to 5.00 am, the witness to this incident Nanaji Kodape and his son Devidas Kodape heard he shouts from the house of the appellant/accused - Sambhaji. Therefore, they went to the house of the appellant/accused - Sambhaji and saw that there was a big flame and appellant/accused - Sambhaji by taking his sons was shouting loudly. Thereafter, they had thrown water and extinguished the fire. When they entered into the house, they saw that the deceased - Shalu had died due to burn on the spot. It is also the prosecution case that the appellant/accused - Sambhaji used to harass the deceased wife - Shalu on account of non-fulfillment of the demand of dowry. As such, an offence punishable u/s 306 of the Indian Penal Code came to be registered vide Crime No. 60 of 2006. After investigation, the charge-sheet came to be filed for the offences punishable under Sections 498-A and 306 of the Indian Penal Code, in the Court of the learned Judicial Magistrate First Class, Chandrapur. The learned Judicial Magistrate First Class, Chandrapur, who, in turn committed the case to the Sessions Court, Chandrapur. The charges came to be framed against the accused under Sections 498-A and 306 of the Indian Penal Code. He pleaded not guilty and claimed to be tried. During the trial, after evidence of PW-6 Medical Officer - Vinod Daulatrao Nagrale was recorded, the prosecution filed an application for framing the additional charge under Sections 302 and 201 of the Indian Penal Code. Accordingly, the additional charge u/s 302 read with 201 of the Indian Penal Code came to be framed. At the conclusion of the trial, the learned Ad-hoc Additional Sessions Judge-1, Chandrapur convicted the accused. Being aggrieved thereby, the present appeal is filed by the present accused.

2. Shri S.P. Gadling, learned counsel appearing for the appellant submits that the learned trial Judge has erroneously convicted the accused. Learned counsel submits that only on the basis of the evidence of witness PW-6 Medical Officer - Vinod Nagrale, the learned trial Judge has held that the death of the deceased - Shalu was not suicidal but homicidal. Learned counsel submits that the learned trial Judge has not appreciated the evidence of the said witness in correct perspective. Learned Counsel further submits that since the present case is a case based upon circumstantial evidence, the prosecution is required to successfully establish the link of circumstances which would lead to no other conclusion than the guilty of the accused. Learned counsel, therefore, submits that the impugned judgment and order is not sustainable in law.

3. Shri Gadling, learned counsel appearing for the appellant - Sambhaji, relies on the judgments of the Apex Court in the cases of Shankarlal Gyarasilal Dixit Vs. State of Maharashtra, ; and Bikash Chandra Saha Vs. The State of West Bengal, and in the case of the Division Bench of this Court in the case Ramdas Eknath

Mehare vs. State of Maharashtra, reported at 2007 ALL MR (Cri) 3537.

4. Shri T.A. Mirza, learned Additional Public Prosecutor appearing for the respondent - State, submits that the learned trial Judge has rightly passed an order. Learned Additional Public Prosecutor submits that the circumstances which were proved led to no other conclusions than to guilt the accused. Learned Additional Public Prosecutor further submits that since the deceased and the appellant were residing together, in view of the provisions Section 106 of the Evidence Act, the burden was upon the appellant to explain the facts which were exclusively within his knowledge. Learned Additional Public Prosecutor further submits that the false explanation and false defence of the appellant was an additional circumstance corroborating the guilt of the appellant accused. He relies on the judgments of the Apex Court in the cases of Sushil Kumar Vs. State of Punjab, ; Shaikh Sattar Vs. State of Maharashtra, and the Division Bench of this Court in the case of Shivaji @ Savliram Nalawade Vs. The State of Maharashtra, .

5. With the assistance of the learned Counsel appearing for the appellant and the learned Additional Public Prosecutor appearing for the respondent - State, we have gone through the judgment and the evidence placed on record.

6. The present case is a case based on the circumstantial evidence. The learned trial Judge has crystallized the following circumstances which according to the learned Judge are proved against the present appellant - Sambhaji:

1. Homicidal death of the deceased Shalu
2. Place where tragic incident occurred was in possession and occupation of the accused.
3. The incident occurred in the wee hours.
4. Positive opinion of the Medical Officer that such death is either smothering or asphyxial as well as 100% burn.
5. Extensive use of kerosene as can be seen from burn injuries.
6. Total absence of any shout or cries.
7. Deceased was completely motionless.

7. For arriving at the conclusion that the death was homicidal and not suicidal, the learned trial Judge has basically relied on the evidence of PW-6 Medical Officer - Vinod Nagrale, who had conducted the post-mortem on the death body of the deceased. It is to be noted that in the examination-in-chief it self this witness has stated that he had observed that the eyes were totally closed, non-protruding tongue, no evidence of any fluid was loosing. It is further to be noted, that he had further observed that no evidence of any injuries apart from charred skin and subcutaneous tissues of the body found. The learned trial Judge on the basis of the following sentence of this witness has found that the death to be

homicidal "injuries shown in column No. 17 are ante-mortem injuries and can be possible in case of smothering and in case of asphyxial death". However, it is to be noted that the same witness in his deposition has observed thus:

In the case of higher poured kerosene and higher flames surrounded with body, the person cannot see and suffer asphyxia. In that situation person immediately becomes unconscious and after becoming the patient unconscious the injuries mentioned in column No. 17 i.e. chard injuries can be possible.

It can thus be seen, that on the basis of the evidence of PW-6, the learned trial Judge found the death to be homicidal. However, in his deposition this witness has specifically stated that in the case of excessive use of kerosene and higher flames surrounded with body, the person cannot see and suffer asphyxia. He has further admitted that in such a situation, person immediately becomes unconscious and after becoming the patient unconscious the injuries mentioned in column No. 17 are possible. It can thus be seen that the learned trial Judge has only considered one sentence in the evidence of the said witness, but totally ignored the admission given by him in his cross-examination. It can thus be seen that the evidence of this witness was not sufficient to conclusively arrive at a finding that the death was homicidal. In Gradwhol's Legal Medicine, edited by FE Camps, 1968, (John Wright & Sons Ltd.) it has been stated that in case of death due to asphyxia, the eyes are prominent and open. It has further been stated that the tongue is often swollen, bruised, protruding and dark in colour, showing patches of extravasation and occasionally bitten by the teeth. The perusal of evidence of PW-6 would reveal that the said witness has himself stated that the eyes were totally closed, non protruding tongue.

In that view of the matter, we are of the view that the learned trial Judge on the basis of only one sentence in the evidence of the Medical Officer could not have come to the conclusion the death was homicidal.

8. It is to be noted that the learned trial Judge has disbelieved the evidence of PW-1 Vasanta Mandhre - father of the deceased and PW-2 Suresh Mandhre - uncle of the deceased insofar as allegations regarding non-fulfillment of dowry, and as such acquitted the accused of the offence punishable u/s 498-A of the Indian Penal Code. PW-2 Suresh Mandhre, in his evidence, has stated that after coming to know about the incident, he went to the house of deceased - Shalu and accused. He has also stated that son of deceased - Shalu viz. Ajay, who had also sustained burn injuries and, therefore, he was hospitalized in the WCL hospital. On being enquired, Ajay told that his mother was killed by 2-3 persons and thereafter kerosene was poured on her. However, PW-3 - Ajay s/o Sambhaji Pachare (son of deceased/appellant) has also been examined by the prosecution and he has not supported the version of PW-2 Suresh Mandhre. PW-3 Ajay Pachare has stated that all were in sleep. When he was in sleep he felt feeling of fire flames and, therefore, he woke up. The said witness was cross-examined. Except this evidence, nothing is brought on record by the prosecution so as to establish the guilt of the accused-appellant. It is to be noted that the learned

trial Judge has come to a finding that the son of the deceased had not sustained any injuries though he was sleeping adjoining to his mother. However, the finding given by the learned trial Judge appears to be in total ignorance of the evidence of PW-2 the uncle of the deceased, that Ajay had also sustained burn injuries and he was hospitalized in the WCL hospital. As such, finding given by the learned trial Judge in this respect is totally unsustainable. The learned trial Judge has further come to a finding that prior to the setting on fire deceased may be made unconscious and then set her on fire by pouring kerosene oil but she has not committed suicide. In our view, such a finding is not based on the basis of anybody's case on record but purely on conjectures and surmises.

9. No doubt, that the place where the incident had occurred was being resided by the deceased and the accused, that the incident had occurred in the wee hours, that there was excessive use of kerosene, and that the deceased was motionless. However, these circumstances cannot be said to be the circumstances which would establish the guilt of the accused beyond reasonable doubt.

10. Insofar as the contention of the learned Additional Public Prosecutor regarding applicability of Section 106 of the Indian Penal Code, is concerned, it will be relevant to refer to the judgment of the Apex Court in the case of Sawal Das Vs. State of Bihar, . The Apex Court has observed in paragraph Nos. 9 and 10 thus:

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, , 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: Has the prosecution discharged its initial or general and primary burden of proving the guilt of the appellant beyond reasonable doubt?

It can thus clearly be seen that the Apex Court has held that the burden of proving a plea specifically set up by an accused, which may absolve him from criminal liability, certainly lies upon him. Further, the Apex Court has held that neither 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 has been held that only when the prosecution has led evidence which, if believed, will sustain a conviction or, which makes out a *prima facie*, the question arises of considering the facts of which the burden of proof may lie upon the accused. In the said case, the Apex Court considered death of woman whose husband, father-in-law and mother-in-law were tried for an offence punishable u/s 201 read with 34 of the Indian Penal Code. The deceased was alone. It was the allegation of the prosecution that the wife was murdered in the house of accused and after that, her body was hurriedly cremated. The trial Court convicted all the three accused. In an appeal, the High Court allowed the appeal and acquitted the father-in-law and mother-in-law, but maintained the conviction of the husband, holding that it was only the husband who was liable to be convicted for an offence punishable u/s 302. In an appeal filed by the husband before the Apex Court, the Apex Court found that there was nothing which could fasten the liability for any particular or separate act of the appellant which may be said to have taken away the life of his wife. The Apex Court, therefore, while setting aside the conviction u/s 302 of the Indian Penal Code maintained the conviction only u/s 201 of the Indian Penal Code.

11. It will also be relevant to refer to the judgment of the Apex Court in the case of Shankarlal Gyarasilal Dixit cited *supra*. In the said case also the appellant was convicted on the basis of the circumstantial evidence. The High Court maintained the conviction. The Apex Court while allowing appeal of the appellant has observed in paragraph No. 32, thus:

32: The High Court, it must be said, has referred to the recent decisions of this Court in *Mahmood Vs. State of U.P.*, and *Chandmal and Another Vs. State of Rajasthan*, in which the rule governing cases of circumstantial evidence is reiterated. But, while formulating its own view the High Court, with respect, fell into an error in stating the true legal position by saying that what the Court has to consider is whether the cumulative effect of the circumstances establishes the guilt of the accused beyond a "shadow of doubt". In the first place, "shadow of doubt", even in cases which depend on direct evidence is shadow of "reasonable" doubt. Secondly, in its practical application, the test which requires the exclusion of other alternative hypothesis is far more rigorous than the test of proof beyond reasonable doubt.

It can thus clearly be seen that the Apex Court in clear terms held that the test which requires the exclusion of other alternative hypothesis is far more rigorous than the test of proof beyond reasonable doubt.

12. It will also be relevant to refer to the judgment of the Apex Court in the case

of Sharad Birdhichand Sarda Vs. State of Maharashtra, . The Apex Court in paragraph Nos. 150 and 151 has held thus:

150. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this; where various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court.

151. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basis decision of this Court is Hanumant Vs. The State of Madhya Pradesh, . This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail v. State of U.P., (1969) 3 SCC 198 and Ram Gopal Vs. State of Maharashtra, . It may be useful to extract what Mahajan, J. has laid down in Hanumant's case (at pp. 345-46 of AIR) (supra):

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilty is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

It can thus clearly be seen that the Apex Court in clear terms has held, that firstly it is the duty of the prosecution to establish the circumstances from which the conclusion of guilt is to be drawn should be fully established. It has further been held that they should exclude every possible hypothesis except the one to be proved. It has further been held that there must be a chain of evidence so complete as not to leave any reasonable doubt for the conclusion consistent with the innocence of the accused and must show that in all human possibility the act must have been done by the accused.

13. Insofar as the judgment of the Apex Court in the case of Shaikh Sattar vs. State of Maharashtra cited supra is concerned, the Apex Court has observed in para-21 thus:

21. But it is also correct that, even though, the plea of alibi of the appellant is not established, it was for the prosecution to prove the case against the appellant. To this extent, the submission of the learned counsel for the appellant was correct. The failure of the plea of alibi would not necessarily lead to the success of the prosecution case which has to be independently proved by the prosecution beyond reasonable doubt. Being aware of the aforesaid principle of law, trial court as also the High Court examined the circumstantial evidence to exclude the possibility of the innocence of the appellant. Since the case of the prosecution rests purely on circumstantial evidence, the trial court and the High Court examined all the material circumstances to ensure that the guilt of the appellant has been established beyond reasonable doubt. We see no reason to disagree with the conclusion arrived at by the trial court as well as the High Court.

It can thus clearly be seen that the Apex Court has held that though the plea of alibi of the appellant is not established, it was for the prosecution to prove the case against the appellant. The Apex Court in the said case found that since the case of the prosecution rests purely on circumstantial evidence, the trial court and the High Court examined all the material circumstances to ensure that the guilt of the appellant has been established beyond reasonable doubt.

14. Insofar as the reliance placed by the learned Additional Public Prosecutor appearing for the respondent - State in the case of Sushil Kumar cited supra is concerned, in the said case also the Apex Court found that the prosecution had proved beyond all reasonable doubt that the appellant had done away his wife and two children. In the said case also the prosecution had proved all the circumstances and also established the chain of circumstances which lead to no other conclusion than to guilt the accused.

15. Insofar as the judgment of the Apex Court in the case of Prabhudayal and others Vs. State of Maharashtra, on which the reliance has been placed by the learned trial Judge is concerned, from the perusal of the judgment of the Apex Court, it can clearly be seen that the Apex Court upon perusal of the evidence that was led on behalf of the prosecution, had come to the conclusion that the circumstances which were established by the prosecution were established beyond reasonable doubt, insofar as complicity of appellants 1 and 8 therein was concerned. In the said case, the medical evidence shows that the asphyxia was not due to burns. It has further been held that internal injuries which occur in case of strangulation were found. It has further been found that there was total burning of neck to destroy evidence of attempted strangulation. It has further been found that half burnt post card planted near dead body to indicate suicidal death.

16. It will be also relevant to refer to the judgment of the Apex Court in the case of Trimukh Maroti Kirkan Vs. State of Maharashtra, , wherein the Apex Court has reiterated the principle of conviction based on circumstantial evidence. The Apex Court in paragraph No. 12 has held thus:

In the case in hand there is no eyewitness of the occurrence and the case of the prosecution rests on circumstantial evidence. The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with their innocence.

It can thus clearly be seen that the Apex Court reiterated that the normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established and that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused. It has further been held that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation of any hypothesis other than that of the guilt of the accused and inconsistent with their innocence.

17. In the present case, we find that the prosecution has firstly failed to prove that the case was of homicidal death. Secondly, the prosecution has failed to prove any circumstances which would establish the complicity of the appellant. It is necessary for the prosecution to establish each and every incriminating circumstance beyond reasonable doubt. The prosecution has to further establish that the circumstances, proved are so interwoven to each other that it can lead to no other conclusion than the guilt of the accused. We are of the considered view that the prosecution has failed to do so. In that view of the matter, we find that the impugned judgment and order is not sustainable in law. The appeal is, therefore, allowed. The judgment and order is quashed and set aside. The appellant is directed to be set at liberty forthwith, if not required in any other case.