

(2013) 01 BOM CK 0086
In the Bombay High Court
Case No : Criminal Appeal No. 934 of 2004

Santosh Jaywant Takawane

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 23-01-2013

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 504, 506

Citation : (2013) 3 ABR 1068 : (2013) ALLMR(Cri) 2882 : (2013) ALLMR(Cri) 2875 : (2014) 2 BomCR(Cri) 789

Hon'ble Judges : Naresh H. Patil, J;A.R. Joshi, J

Bench : Division Bench

Advocate : Apeksha Vora, for the Appellant; H.J. Dedhia, APP, for the Respondent-State, for the Respondent

Final Decision : Dismissed

Judgement

A.R. Joshi, J.—Heard rival arguments on this Criminal Appeal preferred by the appellant/orig. accused challenging the judgment and order of conviction dated 11.6.2004 passed by the IInd Additional Sessions Judge, Baramati, District-Pune. The impugned judgment and order was passed in Sessions Case No. 25 of 2003 and present appellant/sole accused was convicted for the offence punishable u/s 302 of IPC and was sentenced to suffer imprisonment for life and to pay fine of Rs. 500/-, in default to suffer RI for two months. The case of the prosecution, in nutshell, is as under:

The complainant-Vithabai is resident of village Pargaon, Taluka-Daund, District-Pune. She has three sons, namely, Shantaram, Chandrakant and Kailash. All her sons were residing separately with their respective families, but they were residing in the neighbourhood of the complainant. The family of the complainant owned an agricultural land known as "Satpatti land" situate at a distance of about 3 km from Pargaon and they were cultivating the said land separately. Deceased Nirmala was wife of Chandrakant and she has one son and daughter out of the marriage. Appellant/accused is the relative of the complainant and was

frequently visiting the house of Nirmala. Due to such frequent visits, apparently the appellant/accused had developed intimacy with Nirmala and about six months prior to the main incident of fatal assault on the victim, there was some incident occurred at the house of Nirmala. That time, the complainant had occasion to witness the presence of the appellant/accused in the house of Nirmala and also witnessed that appellant/accused and Nirmala were in compromising position and were having sexual intercourse. Noticing this incident, there was hue and cry in the family and appellant/accused was reprimanded by the complainant and she drew him out of the house of Nirmala and warned him not to come to the house and meet Nirmala again. While going away, appellant/accused has threatened the complainant of dire consequences. Complainant disclosed the said incident to her elder son Shantaram (PW-2) and as such Shantaram also censored the appellant/accused and warned him not to come to the house of Chandrakant and Nirmala. After this incident and censoring of the accused, he stopped visiting the house of victim Nirmala.

2. On this background, the alleged incident of assault on victim Nirmala occurred in the morning of 15.8.2002. At about 11:15 a.m. on that day, the complainant Vithabai along with her daughter-in-law victim Nirmala and one more woman by name Sundarabai (PW-4) were proceeding towards the sugar-cane crop grown in the Satpatti land for taking out the grass and weeds. That time, appellant/accused chased them and accosted victim Nirmala. Complainant-Vithabai was ahead. She heard the noise of falling of one pot and therefore turned back and saw the appellant/accused assaulting Nirmala with the help of knife and that time he had pressed the mouth of Nirmala by one hand. The assault was on the neck, chest and also on the hands of Nirmala. Seeing this incident, the complainant rushed towards the appellant and the victim. However, appellant continued assaulting Nirmala with the help of knife. Having severely bleeding injuries, Nirmala fell down on the ground. The complainant raised shouts for help. One Shahaji Salunke (PW-7) rushed to the spot as he was in the nearby area. Seeing coming of said Salunke to the spot, the appellant/accused ran away from the spot leaving behind the weapon of assault i.e. knife and also apparently his pair of slippers. Nirmala succumbed to the injuries. The complainant Vithabai went to Yavat police station and narrated the incident. It was taken down by PW-10 Police Sub-Inspector Narayan Sarangkar. Said complaint was treated as First Information Report (Exh. 11) and offence was registered at C.R. No. 125 of 2002 for the offence punishable under Sections 302, 504 and 506 of IPC against the appellant/accused.

3. On the same day of the incident, scene of offence was visited by the police along with panchas and scene of offence panchnama was conducted. That time, knife, separate plastic handle of knife, pieces of bangles, pair of a male slippers and pair of female slippers and the soil mixed with blood and also soil from the area were taken charge of under the panchnama. Dead body of victim Nirmala was sent for postmortem after inquest panchnama and postmortem report was obtained from the Primay Health Centre, Yavat. Postmortem was conducted by

PW-8 Dr. Ashok Rasage. In the postmortem report, cause of death is mentioned as shock due to punctured right lung due to punctured wound over the right supraclavicular area. Separate panchnama was conducted during which clothes of the victim woman were taken charge of as produced by police head constable Holkar. House of the appellant/accused was searched and panchnama was prepared. However, the appellant/accused was not found as he was missing. Subsequently he came to be arrested on 27.8.2002 i.e. after about 12 days of the incident. It is also the case of the prosecution that on 29.8.2002 appellant/accused made a voluntary statement to produce his clothes and thereafter said clothes were recovered at his instance under the panchnama. All the seized muddemal articles were sent for chemical analysis. Chemical Analyzer's report was obtained. Statements of various witnesses were recorded during investigation and on completion of investigation, chargesheet was filed against the appellant/accused and the matter was committed to the Court of Sessions and was disposed of by convicting the appellant/accused. Said conviction is challenged in the present appeal.

4. Prior to dealing with the arguments advanced by learned Advocate Ms. Apeksha Vora, appointed to represent the appellant/accused, certain factual position is required to be mentioned in order to have proper perspective of the matter and in order to ascertain the scope of the arguments vis-a-vis the substantive evidence of prosecution witnesses.

5. During the trial, total ten prosecution witnesses were examined. PW-1 is the complainant Vithabai, mother-in-law of victim Nirmala. She is an eye witness to the incident. PW-2 is Shantaram, son of the complainant. Admittedly, PW-2 Shantaram is not an eye witness. According to this witness, his mother (complainant) had told him regarding intimacy between the appellant/accused and the victim Nirmala. This witness has also reprimanded appellant/accused and warned him not to visit the house of his brother Chandrakant i.e. husband of the victim Nirmala. According to this witness, the appellant/accused had given him threat of dire consequences due to such reprimanding. This witness has also went to the parents of the appellant/accused and informed them regarding the incident of intimacy between the appellant/accused and the victim woman. At the time of incident on 15.8.2002, he was at school and one Shahaji Salunke (PW-7) informed him that Nirmala was murdered at Satpatti land and as such he rushed to the spot and saw Nirmala lying in severely injured condition and she was dead. He also noticed the knife and a pair of slippers of the accused and also saw one pot/utensil lying nearby.

6. PW-3 is Kanifnath Jedhe. On the day of the incident, in the afternoon he was sitting on the culvert bridge on Pargaon-Kedgaon road. That time he noticed appellant/accused proceeding towards Kedgaon. That time apparently accused was in frightened condition. According to PW-3, accused disclosed that some 4-5 persons were chasing him to beat and, therefore, the appellant/accused requested him to carry him about 2 Kms ahead on the road, but as said PW-3

had no vehicle with him, he denied the request. According to said PW-3, that time the hands of the accused were stained with blood and he was bare foot and there was blackish t-shirt and white pant on his person and they were also having blood stains.

7. PW-4 is another eye witness Smt. Sunderabai. She was present at the incident place when she was walking along the cart road with complainant Vithabai and victim woman Nirmala. According to this witness, Vithabai was proceeding ahead and this witness was following her. At the extreme back side, victim Nirmala was walking. Said PW-4 heard noise of falling of utensil/pot. Therefore, she turned back and saw that the appellant/accused was assaulting Nirmala with the help of knife and had pressed the mouth of Nirmala by one hand. She also witnessed that due to said assault, Nirmala had fallen down on the ground and by that time the complainant-Vithabai also reached the spot on seeing the incident and shouted for help. Seeing this incident of deadly attack on the victim Nirmala, said PW-4 became frightened and went to her house.

8. PW-5 is the spot pancha. PW-6 is the pancha regarding seizure of clothes from the victim. PW-7 is Shahaji Salunke and he witnessed the part of the incident of assault. At the relevant time of the incident, he was at his field and was loading sugarcane in the tractor. It was about 11:15 a.m. That time, he heard the shouts of Sunderabai and Kolthebai. He went ahead to see and found victim Nirmala lying on the ground and her mother-in-law Vithabai was standing there. He also saw the appellant/accused running away from the spot. This witness arranged for the jeep after informing the son of the complainant Vithabai, for taking victim Nirmala to hospital.

9. PW-8 is Dr. Ashok Rasge who performed postmortem on the dead body of victim.

10. PW-9 Pramod Nimbalkar is a panch witness regarding the memorandum statement and seizure of clothes of the accused on 29.8.2002.

11. PW-10 Narayan Sarangkar is the last witness who is investigating officer in the case.

12. Now coming to the arguments advanced on behalf of the appellant/accused, it must be mentioned that the substantive evidence of prosecution witnesses and mainly that of the eye witnesses is assailed by learned appointed Advocate Ms. Apeksha Vora.

13. Following are the points/objections raised on behalf of the appellant/accused in order to canvass the proposition that the evidence led before the trial Court is not sufficient enough to hold the appellant/accused guilty for the offence punishable u/s 302 of IPC. Said points/objections are:

[I] PW-1 complainant is not an eye witness and is a got up witness.

[II] The knife recovered on the spot, though allegedly taken as weapon of

assault, has not been shown to any of the eye witnesses. So also the pair of slippers seized from the spot were not shown to any of the eye witnesses. No steps were taken by the investigating agency to ascertain whether the male slippers/chappels were matching with the feet of the accused.

[III] According to PW-1 she showed the spot of offence to the police and she never went to Yavat police station. However, according to her when she reached the spot along with the police, other police party was already present and photographs of the scene of offence were being taken. As such her testimony is not trustworthy inasmuch as she lodged the complaint to the police and also shown the spot of offence to the police for the first time.

[IV] Statement of PW-4, another alleged eye witness, was recorded after three days, and as such it is doubtful whether she had really witnessed the incident of assault.

[V] There is discrepancy regarding the timing at which the clothes of the deceased were seized. According to the case of prosecution, the clothes were seized under the panchnama conducted between 6:15 p.m. to 7:00 p.m. whereas it is specifically mentioned in the postmortem report that blood stained clothes of the victim were on her person when the postmortem was conducted between 5:30 p.m. to 6:30 p.m..

At this juncture itself, it must be mentioned that there is no much merit in this objection raised on behalf of the appellant/accused and otherwise also this aspect is not going to the root of the matter concerning the guilt of the appellant/accused or otherwise. In other words, the timings mentioned, as above, regarding seizure of clothes of the victim and finding of clothes on the dead body when the postmortem was started, do not in any way convey the meaning that either there was no postmortem done, as stated by doctor PW-8, or the clothes of the victim were not recovered under any panchnama.

In any event, this point of argument cannot be taken as a circumstance in favour of the appellant/accused.

[VI] The depth of the injuries is not corresponding to the length of the blade of knife. By this argument, it is canvassed on behalf of the appellant that Article No. 3, the knife, is not the weapon of offence.

On this aspect is advantageous to describe the injuries sustained by the victim and as noted down in the postmortem report. In this regard, the relevant portion in the examination-in-chief of PW-8 Dr. Ashok Rasge, is reproduced hereunder:

1. On external examination, I found following injuries on her person:

(1) Punctured wound over the neck on right lateral aspect area at supra clavicular area with size about 1 inch in length and 5 inch in long with punctured upper lobe of right lung;

(2) incised wound over the left shoulder area at anterior aspect with size about

3"x1/4"x1/4" with linear margins;

(3) Incised wound over the right shoulder area anterior aspect with size about 2 1/2" x 1/4" x 1/4" with linear margins;

(4) abrasion over the chest on left side at the level of 12 rib and mid area with size about 1" x 1/4";

(5) Abrasion over the chest on left side near injury No. 4 and with size about 1 1/2 " x 1/4";

(6) Incised wound over the left thumb at mid area and with size about 1" x 1/4" x 1/4".

(7) Incised wound over the left little finger at tip area with size 1.1/2" x 1/4" x 1/4".

Above all injuries were antemortem.

2. In internal examination, I found that right lung and pleura were ruptured and thoracs with blood. Both the lungs were pale. Heart was empty. I noticed that liver, kidney and brain and spleen were pale.

In our considered view, there is nothing in this argument as to doubting the case of prosecution regarding use of knife (article No. 3) as the weapon of offence. Again on this aspect, a reference can be made to the objection raised secondly above as to not showing the knife to any of the eye witness. On this aspect, in our considered view, it is not the necessity that the weapon of offence is must to be shown to eye witness in order to ascertain that it is the same weapon used by the assailant. Again on this second point of objection regarding pair of slippers not shown to the witnesses and no steps taken by the investigating machinery to find out whether said male slippers were fitting in the feet of the accused, it must be said that not taking such steps during the investigation cannot be treated as a mitigating circumstance to the case of prosecution. Had this procedure been adopted by the prosecution, it would have been an added advantage to the case of prosecution but lack of taking of such steps cannot be treated as a failure of prosecution to establish the involvement of the appellant/accused if otherwise such involvement is established mainly by way of testimony of eye witnesses, as in the present case.

14. Now coming to the point Nos. I & III of the argument listed above, it must be said that the main thrust of the argument advanced on behalf of the appellant/accused was on the substantive evidence of PW-1. By taking us to the minute cross-examination of this witness coupled with details in the cross-examination of PW-4 Smt. Sundarabai and PW-7 Shahaji Salunke, it is tried to argue that these witnesses are not trustworthy and there is a concoction to falsely implicate the present appellant/accused. Prior to discussing the said main argument advanced on behalf of the appellant/accused, certain admitted position is required to be mentioned. Admittedly, said PW-1 is mother-in-law of the victim

Nirmala. Said PW-1 is old lady, then aged about 70 years when she gave the evidence before the trial Court in February, 2004. She gave evidence regarding the incident which happened on 15.8.2002 i.e. after the lapse of two years from the incident. It is also an admitted position that said PW-1 Vithabai is an agriculturist and then doing household work also, and apparently there is nothing on record that she is school educated. Thus, essentially the background of PW-1 is required to be borne in mind while appreciating her evidence. In other words, in our considered view, her evidence cannot be scrutinized in the same manner as that of a well read and well educated person much aware of the surrounding and able to give answers in the cross-examination with a substantial intelligence. In other words, considering the rustic nature of PW-1 Vithabai and staying in a village, doing agricultural work, the answers given by her during the cross-examination are required to be construed with certain allowance. It is brought to our notice during the argument that during the cross-examination she had answered that she did not go to Yawat police station to lodge complaint. As against this answer, the substantive evidence of Investigating Officer (PW-10) disclose that the complainant-Vithabai came to Yavat police station and lodged the complaint. This evidence of PW-10 is appearing in para-1 in the notes of his evidence. It is brought to our notice that she had no knowledge whether Shahaji Salunke (PW-7) and her another son Shantaram (PW-2) had visited the scene of offence and saw the dead body of Nirmala. Further she had no knowledge that Shantaram lodged complaint to the police. However, she had answered that Shantaram had brought police at the spot of the incident. As against this evidence of PW-1, appearing in para-7 in the notes of evidence, our attention is drawn towards her earlier evidence in chief appearing in para-4 to the effect that after lodging the complaint, she had shown the dead body of Nirmala and spot of the incident to the police. On this aspect, it is strongly argued that said PW-1 had shown the spot of incident to the police as mentioned in examination-in-chief. However, in the cross-examination, in para-7 she had further answered that prior to she went to the spot of incident police were preparing panchnama and were taking photographs of the dead body.

15. It is also argued that nowhere in her evidence PW-1 had stated that one Shahaji Salunke also came to the spot when the incident of assault was almost over. In other words, it is submitted that said PW-1 did not take name of Shahaji Salunke as running to the spot after hearing the commotion. As against this, according to PW-7 Shahaji Salunke he was at his field loading sugar-cane on the tractor at about 11:15 a.m. Sunderabai and Kolthebai came running and shouting in his field. Then he went to the field of Chandrakant i.e. husband of the victim Nirmala and he saw Nirmala lying on the ground and her mother-in-law Vithabai standing there and shouting and at that time accused was running towards the road. It is submitted that this variance in the substantive evidence of PW-1 vis-a-vis the substantive evidence of PW-7 is vital thus leading to the doubt whether PW-1 was really present on the spot. It is also submitted by pointing out the substantive evidence of PW-4 that said Smt. Sunderabai went to her house

as she became frightened on witnessing the deadly assault on Nirmala. She did not mention as to going to the field of Shahaji Salunke along with another woman Kolthabai. It is further submitted that according to the substantive evidence of PW-7 Shahaji Salunke, as mentioned earlier, Sunderabai and Kolthabai came running to the field and then he went and saw Nirmala and PW-1 standing by her side. It is also brought to our notice that statement of said Sunderabai was recorded after three days of the incident thus creating a doubt whether she was really an eye witness. On the above arguments, we have carefully gone through the substantive evidence of PWs-1, 2, 4 & 7 and we have observed that there is ample requisite corroboration to the case of prosecution as to presence of PW-1 Vithabai and PW-4 Sundarabai along with victim Nirmala, and both of them witnessing the assault and noticing that the victim fell on the ground in severely injured condition and died on the spot after some time. There is also substantive evidence of PW-3 Kanifnath on the aspect that he saw the appellant/accused proceeding towards Kadegaon in frightened condition and requesting said witness to take him further 2 kms ahead as 4-5 persons were chasing him. It is also on record that PW-7 Salunke on knowing the incident through Sunderabai and Kolthabai visited the spot and thereafter informed Shantaram (PW-2). This evidence of PW-7 is corroborated by PW-2 as according to him Shantaram Salunkhe informed him that Nirmala was murdered in Satpatti land and then he went and saw Nirmala in an injured condition and also noticed the knife, slippers and other articles lying on the spot. Considering the effect of the substantive evidence of these prosecution witnesses, in our considered view, the minor variance interse is not of such a magnitude to disbelieve the case of prosecution as to involvement of the appellant/accused in the offence of murder. In the result, there is no merit in the present appeal and the same is accordingly disposed of with following order:

ORDER

[i] Criminal Appeal No. 934 of 2004 stands dismissed.