
(2013) 03 BOM CK 0115
In the Bombay High Court
Case No : Criminal Appeal No. 696 of 2007

Shekhar Chandrakant Nadkar	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 07-03-2013

Acts Referred:

Evidence Act, 1872 — Section 106
Penal Code, 1860 (IPC) — Section 302, 449

Citation : (2013) ALLMR(Cri) 2869

Hon'ble Judges : V.K. Tahilramani, J;Sadhana S. Jadhav, J

Bench : Division Bench

Advocate : Rohini M. Dandekar, for the Appellant; S.A. Shaikh, APP, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Tahilramani, J.—This appeal is directed by the appellant-original accused against the judgment and order dated 20.02.2007 passed by the learned Additional Sessions Judge & Special Judge for SEBI Act in Sessions Case No. 941 of 2006. By the said judgment and order, the learned Sessions Judge convicted the appellant u/s 302 of IPC and sentenced him to suffer imprisonment for life and fine of Rs. 5000/- in default R.I. for two months. The prosecution case briefly stated, is as under:

(a) Mangal (deceased) was the daughter of PW 5 Siddharth and Gajubai. They used to reside in Dharavi, Mumbai. Gajubai used to work in the house of PW 6 Chetan Gandhi as maid servant. Chetan Gandhi was residing at Flat No. 7, 2nd Floor, Yashodhan Building, Opp. Municipal School at Sion, Mumbai. PW 1 Nilima was also working in the house of Chetan Gandhi as a maid servant. PW 1 Nilima used to reside in the house of Chetan Gandhi whereas Gajubai, the mother of Mangal used to come at about 12 noon to the house of Chetan Gandhi for cleaning utensils, sweeping and mopping and after mopping, she used to go back. Whenever Gajubai could not attend the work, her daughter Mangal i.e. the

deceased used to come for work in the house of PW 6 Chetan Gandhi. Mangal was having an affair with the appellant.

(b) The incident occurred in the afternoon on 10.08.2006 in the flat of PW 6 Chetan Gandhi. PW 1 Nilima, maid servant of PW 6 Chetan Gandhi was in the flat. At about 01.00 p.m., Mangal alone came for work. Both Mangal and PW 1 Nilima were working in the house. At about 01.15 p.m., there was a phone call on the land line. Nilima picked up the phone. The man on the phone asked her whether Mangal was there. He stated that he was the brother of Mangal. PW 1 Nilima then gave the phone to Mangal. Mangal disclosed to the caller that her employer (bhabhi) was not in the house and told him that she (bhabhi) had gone to attend pooja in their new shop. Thereafter at about 2.15 p.m., bell rang. Mangal opened the door. The appellant was standing in front of the door. The appellant and Mangal were talking to each other for about 20 minutes at the door itself. PW 1 Nilima asked Mangal who the person was whereupon Mangal disclosed that it was Shekhar i.e. the appellant. PW 1 Nilima knew the existence of Shekhar because whenever Mangal used to work at the house of Chetan Gandhi, Mangal used to very often look down on the road. When PW 1 Nilima asked who was down there, Mangal disclosed to her that one Shekhar was waiting down. Mangal disclosed that Shekhar was her friend. PW 1 Nilima asked Mangal whether she was planning to marry Shekhar. Thereupon Mangal disclosed that her brother had gone to beat him.

(c) At 2.15 p.m., when PW 1 Nilima saw the appellant in the door way, she asked him why he had come there. The appellant disclosed that he had come to meet Mangal. PW 1 Nilima told the appellant that bhabhi (employer) was not in the house, hence, the appellant should return forthwith. However, the appellant entered the house and sat with Mangal in the hall of the flat. Nilima told the appellant whether she should inform the police. Upon this, the appellant told her to lodge complaint against him with the police. Mangal tried to call her employer PW 6 Chetan Gandhi but she could not get him, hence, she called the wife of Chetan Gandhi on her mobile. She informed Mrs. Gandhi that the appellant had come to the flat. Thereafter, Mr. Chetan Gandhi told Nilima not to worry as they were reaching home. Meanwhile PW 1 Nilima went to the toilet for dropping the mopping water there. The appellant followed her to toilet. The toilet door was latched from inside. PW 1 Nilima asked Mangal to open the toilet door but the door was not opened. She heard Mangal telling the appellant to leave her as she had to go home early. PW 1 Nilima heard the appellant telling Mangal that he would not leave her even if he dies. On hearing this, Nilima called on telephone to her employer PW 6 Mr. Chetan Gandhi. Mr. Chetan Gandhi advised her to lock the door and to go to the third floor and shout for help. Accordingly, PW 1 Nilima went to the third floor and shouted for help. On hearing her shouts, people came to help her. She took them to the flat. When they entered the flat, they saw that the toilet door was open. The appellant and Mangal were not in the toilet. On searching the flat, they found the door of bedroom of Mr. & Mrs. Gandhi closed. PW 1 Nilima asked Mangal to open the bedroom door, however, it was not

opened. Meanwhile, police arrived and broke open the door. The appellant and Mangal were found lying on the bed. Injury marks were found on the neck of Mangal. The appellant was found in banian and white pant on the bed. His shirt was found tied on Mangal's neck. Mangal was wearing green coloured Punjabi suit. Her green coloured Odhni was found tied around the neck of the appellant. The police took the appellant and Mangal to the hospital. At the hospital, Mangal was declared dead. The appellant was also examined by PW 9 Dr. Mehta. No injury marks were noticed on the body of the appellant. Though the history was given to the hospital that the appellant was in unconscious state, the Doctor opined that the patient was found pretending to be unconscious as all his parameters were within the normal limits. PW 1 Nilima lodged her FIR. Thereafter, investigation commenced. Dead body of Mangal was sent for postmortem. PW 8 Dr. Dere conducted the postmortem on the dead body of Mangal. The Doctor found following injuries on the dead body of Mangal:-

A) Ligature mark, reddish brown in colour extending from right side of neck just below right angle of mandible passing obliquely at the center of the neck, terminating at lateral side of neck (left), below the level of thyroid cartilage of 8 cms x 2 cms.

Mark is deficient on right side of the neck and posteriorly Mark is non-homogeneous with normal skin intervening.

B) Contused abrasion of 2 cms x 1 cm over right side of the chest just below clavicle 4 cm lateral to manubrium sterni.

The Doctor opined that the above injuries were ante mortem in nature. The injury No. 1 mentioned above is possible by constricting force applied over neck by shirt. The injury at serial No. 2 is possible by hard and blunt object. It is possible by fist of the hand which is also hard and blunt object. The injury at serial No. 1 cannot be self inflicted injury. The Doctor further opined that the sleeve of the shirt shown to him can cause injury No. 1 mentioned herein above and by constriction of the neck with it one can die. After completion of investigation, charge sheet came to be filed.

2. Charge came to be framed against the appellant under Sections 302 and 449 of IPC. The appellant pleaded not guilty to the said charge and claimed to be tried. The defence of the appellant is that of total denial and false implication. After going through the evidence adduced in this case, the learned Sessions Judge acquitted the appellant of the offence u/s 449 of IPC and convicted the appellant u/s 302 of IPC and sentenced the appellant as stated in paragraph 1 above. Hence, this appeal.

3. We have heard the learned Advocate for the appellant and the learned APP for the State. After giving our anxious consideration to the facts and circumstances of the case, arguments advanced by the learned Advocates for the parties, the judgment delivered by the learned Sessions Judge and the evidence on record, for the reasons stated below, we are of the opinion that the appellant

strangled Mangal and caused her death.

4. There is no eye witness to the incident of strangulation, however, the evidence of PW 1 Nilima shows that the appellant and deceased Mangal were the only persons in the bedroom and when the bedroom door was opened, Mangal was found strangled to death. PW 1 Nilima has stated that she was working in the house of Chetan Gandhi as a maid servant. Nilima used to reside in the house of Chetan Gandhi whereas Gajubai, the mother of Mangal used to come at about 12 noon to the house of Chetan Gandhi for cleaning utensils, sweeping and mopping and after mopping, she used to go back. Whenever Gajubai could not attend the work, her daughter Mangal i.e. the deceased used to come for work in the house of PW 6 Chetan Gandhi. Mangal was having an affair with the appellant. PW 1 Nilima further stated that the incident occurred in the afternoon on 10.08.2006 in the flat of PW 6 Chetan Gandhi. At that time, Nilima was in the flat. At about 01.00 p.m., Mangal alone came for work. Both Mangal and PW 1 Nilima were working in the house. At about 01.15 p.m., there was a phone call on the land line. Nilima took up the phone. The man on the phone asked her whether Mangal was there. He stated that he was the brother of Mangal. PW 1 Nilima then gave the phone to Mangal. Mangal disclosed to the caller that her employer (bhabhi) was not in the house and told him that she (bhabhi) had gone to attend pooja in their new shop. Thereafter at about 2.15 p.m., bell rang. Mangal opened the door. The appellant was standing in front of the door. The appellant and Mangal were talking to each other for about 20 minutes at the door itself. Nilima asked Mangal who the person was whereupon Mangal disclosed that it was Shekhar i.e. the appellant. Nilima knew the existence of Shekhar because whenever Mangal used to work at the house of Chetan Gandhi, Mangal used to very often look down on the road. When Nilima asked who was down there, Mangal disclosed to her that one Shekhar was waiting down. Mangal disclosed that Shekhar was her friend. Nilima asked Mangal whether she was planning to marry Shekhar. Thereupon Mangal disclosed that her brother had gone to beat him. PW 1 Nilima further stated that at 2.15 p.m., when Nilima saw the appellant in the door way, she asked him why he had come there. The appellant disclosed that he had come to meet Mangal. Nilima told the appellant that bhabhi (employer) was not in the house, hence, the appellant should return forthwith. However, the appellant entered the house and sat with Mangal in the hall of the flat. Nilima told the appellant whether she should inform the police. Upon this, the appellant told her to lodge complaint against him with the police. Mangal tried to call her employer PW 6 Chetan Gandhi but she could not get him, hence, she called the wife of Chetan Gandhi on her mobile. She informed Mrs. Gandhi that the appellant had come to the flat. Thereafter, Mr. Chetan Gandhi told Nilima not to worry as they were reaching home. Meanwhile Nilima went to the toilet for dropping the mopping water there. The appellant followed her to toilet. The toilet door was latched from inside. Nilima asked Mangal to open the toilet door but the door was not opened. She heard Mangal telling the appellant to leave her as she had to go home early. Nilima heard the appellant telling Mangal that he would not leave her

even if he dies. On hearing this, Nilima called on telephone to her employer Mr. Chetan Gandhi. Mr. Chetan Gandhi advised her to lock the door and to go to the third floor and shout for help. Accordingly, Nilima went to the third floor and shouted for help. On hearing her shouts, people came to help her. She took them to the flat. When they entered the flat, they saw that the toilet door was open. The appellant and Mangal were not in the toilet. On searching the flat, they found the door of bedroom of Mr. & Mrs. Gandhi closed. Nilima asked Mangal to open the bedroom door, however, it was not opened. Meanwhile, police arrived and broke open the door. The appellant and Mangal were found lying on the bed. Injury marks were found on the neck of Mangal. The appellant was found in banian and white pant on the bed. His shirt was found tied around Mangal's neck. Mangal was wearing green coloured Punjabi suit. Her green coloured Odhni was found tied around the neck of the appellant. The police took the appellant and Mangal to the hospital. At the hospital, Mangal was declared dead. The evidence of PW 1 Nilima shows that the appellant and Mangal were having an affair and the appellant was telling Mangal that he would not leave her even if he dies. Her evidence further shows that only the appellant and Mangal were in the bedroom, no one else was in the bedroom. The bedroom door was locked from inside and on opening the door, Mangal was found dead. Obviously, Mangal could not have strangled herself, therefore, the only reasonable conclusion is that the appellant strangled Mangal.

5. That the appellant was in the flat of PW 6 Chetan Gandhi where Mangal was working on the day of the incident at about 2.30 p.m. is also stated by PW 3 Manoj who was residing on the 3rd floor of the very same building. PW 3 Manoj has stated that Mr. Gandhi was residing on the 2nd floor of the building and he was residing on the 3rd floor of the building. On 10.08.2006 as usual, he was returning home at about 02.30 p.m. to have a food. When he was climbing the staircase, he noticed the door of Mr. Gandhi's flat was little open. One boy was standing at the door. He was wearing Orange colour shirt and one girl was in the flat and she was talking to the appellant. At about 03.00 p.m. when PW 3 Manoj was returning back, he found the door of Mr. Gandhi's flat was closed. Thereafter, he went to his office. This witness has identified the appellant as the very same person who was standing at 02.30 p.m. in the door way of the flat of Mr. Gandhi. As stated earlier by us, the evidence of PW 1 Nilima shows that the appellant and deceased Mangal were the only persons in the bedroom of Mr. Gandhi. The evidence of PW 1 Nilima is also corroborated by the evidence of PW 6 Mr. Chetan Gandhi.

6. PW 6 Mr. Chetan Gandhi has stated that Gajubai, the mother of Mangal was working in their house as a maid servant. In absence of Gajubai, her daughter Mangal used to do domestic work in their house. On 10.08.2006, he left home at about 08.45 a.m. His wife and son were with him. On that day, there was pooja in their new shop. At 04.30 p.m., there was a call from his residence on his wife's mobile phone. Their maid servant Nilima was on the line. Nilima disclosed that one boy had entered into the flat and he had taken Mangal to the bedroom.

Mr. Gandhi advised Nilima to shout for help and gather people from the locality. Mr. Gandhi told Nilima that they would be reaching soon. As soon as Mr. Gandhi entered into the flat, Nilima told them that the intruder boy took Mangal to the bedroom. Within a short time, police arrived. The bedroom was closed from inside. As Mr. Gandhi did not have the bedroom door key, the police broke open the door. Inside the bedroom, they found Mangal and one boy. This witness has identified the appellant as the boy who was in the bedroom. The evidence of this witness is also corroborated by the evidence of PW 4 PSI Kolpe.

7. PW 4 PSI Kolpe was on duty in Sion on mobile van. PW 4 PSI Kolpe has stated that at about 05.33 p.m., they received a call from the main control room that some trouble was going on in Yashodhan Building near Municipal High School. As he was nearby, he immediately rushed to the spot within a few minutes. On reaching the flat, its owner Mr. Gandhi met them and disclosed that his maid servant and her friend were in the bedroom of his flat and were not opening the door. As Mr. Gandhi did not have the key of the bedroom, the police broke open the door of the bedroom. On entering into the bedroom, they saw one girl lying, face upwards, on the bed. She was not breathing. Red mark was seen on her throat. They also noticed one boy in white coloured banian lying on the bed by her side. There was green coloured Odhni around the neck of the said boy, however, the boy was found breathing. They immediately took the boy and the girl to the Sion Hospital.

8. The fact that Mangal and the appellant were found in the bedroom is also corroborated by the evidence of PW 10 PSI Kumbhar. On 10.08.2006, PSI Kumbhar was attached to Sion Police Station. At about 05.30 p.m., a message was received from the Control Room to the effect that one boy and one girl are inside one room and the door is latched from inside. The said room was in Flat No. 7, 2nd Floor, Yashodhan Building, Sion (W), hence, PSI Kumbhar and staff immediately rushed to the spot. On reaching the spot, they found staff of Mobile Van of their Police Station was already present. They found the door locked from inside. On knocking the door, nobody opened it, hence, the door was broken. They found one boy and one girl lying on the bed in sleeping position. The boy was breathing. The boy and the girl were rushed to the hospital.

9. Thus the evidence of PW 1 Nilima, PW 4 PSI Kolpe, PW 6 Chetan Gandhi and PW 10 PSI Kumbhar shows that the appellant and the deceased Mangal were the only two persons in the bedroom of PW 6 Chetan Gandhi and the door of the bedroom was locked from inside. No other person was in the room. Looking to the fact that the appellant and Mangal were the only two persons in the bedroom and the bedroom was locked from inside, Section 106 of the Evidence Act would come into play.

10. The evidence of the above four witnesses shows that the deceased was last seen alive in company of the appellant in the house of PW 6 Chetan Gandhi. In such case, the appellant has to explain how Mangal sustained injuries and died. In this connection, we may refer to Section 106 of the Evidence Act. Section 106

of the Evidence Act provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. In several recent decisions, the Supreme Court has held that the principles which underlies Section 106 of the Evidence Act can be applied in cases when certain facts are especially within the knowledge of a person. In the State of Rajasthan Vs. Kashi Ram, , the Supreme Court has observed that if the accused fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation as an additional link which completes the chain.

11. PW 8 Dr. Dere who conducted the postmortem has clearly stated that the injury on the neck i.e. ligature mark cannot be a self inflicted injury. Obviously, Mangal could not have strangled herself, hence, one can reasonably assume that the only other person in the room i.e. the appellant strangled Mangal. As far as the appellant is concerned, no injuries were found on his person. Though Mangal's Odhni was found tied around his neck, there is no ligature mark on the neck or any injury of any sort of injury on his body. PW 9 Dr. Mehta who examined the appellant has stated that the patient i.e. the appellant was found pretending to be unconscious because on examination, he found the appellants general condition in respect of pulse rate, temperature, systemic examination and other parameters were within normal limits. Thus, this shows that the appellant strangled Mangal and thereafter he pretended that he has strangled himself, however, his story is falsified by the medical evidence. This provides an additional link in the chain of circumstances.

12. All the witnesses i.e. PW 1 Nilima, PW 4 PSI Kolpe, PW 6 Chetan Gandhi and PW 10 PSI Kumbhar have stated that the appellant and the deceased were the only persons in the room. There was no other person in the bedroom. From this, it can be stated beyond reasonable doubt that it was the appellant who caused the murder of Mangal by strangulating her. Looking to the evidence on record, we find no merit in the appeal, hence, we proceed to pass the following order:-

ORDER

- i. The appeal is dismissed.
- ii. Office to communicate this order to the Superintendent of prison where the appellant is lodged and to the appellant original accused.

At this stage, we must record our appreciation for Advocate Mrs. Rohini

Dandekar who is on the High Court Legal Services Committee, appointed to represent the appellant in this appeal. We found that she had meticulously prepared the matter and she has very ably argued the appeal. We quantify total legal fees to be paid to her in this appeal by the High Court Legal Services Committee at Rs. 2200/-. The said fees be paid to Advocate Mrs. Dandekar within three months from today.