
(2012) 03 BOM CK 0171
In the Bombay High Court
Case No : Criminal Appeal No. 456 of 2010

Shivaji @ Savliram Nalawade

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 20-03-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 106, 114, 27
Penal Code, 1860 (IPC) — Section 302

Citation : (2013) 2 ABR 539 : (2013) BomCR(Cri) 267

Hon'ble Judges : T. V. Nalawade, J;Naresh H. Patil, J

Bench : Division Bench

Advocate : A.N. Kakade, for the Appellant; V.D. Rakh, Assistant Public
Prosecutor for State, for the Respondent

Final Decision : Dismissed

Judgement

T. V. Nalawade, J.—The appeal is filed against judgment and order of Sessions Case No. 92/2010, which was pending in the Court of Additional Sessions Judge -3, Aurangabad. The appellant is convicted and sentenced for the offence punishable u/s 302 of Indian Penal Code ("I.P.C." for short). Both the sides are heard. The case of the prosecution is as under :- Vimalbai, the deceased, was the mother of complainant Ashok. The appellant/accused was the husband of the deceased. The accused is a resident of village Daregaon, Tahsil Paithan, District Aurangabad. There was cohabitation of few years and during the cohabitation three sons were born to Vimalbai from the accused. Due to some dispute with accused Vimalbai started living with her brother in village Kham-pimpri, Tahsil Shevgaon, District Ahmednagar about 15 years prior to the incident of murder. All the three sons were also living with her. The accused did not keep contact with his family for about 15 years.

The accused visited the house of the deceased from Kham-pimpri about 6 months prior to the incident in question. The accused requested the deceased to

return to his village and resume cohabitation. The accused promised to behave well, but Vimalbai. and her sons were not convinced. The accused kept visiting the house of deceased from Kham-pimpri to see her during this period of six months. He also started staying there for 1 or 2 days.

2. On 1.8.2009 accused lastly visited the house of deceased and on this occasion, he requested the deceased to come to village Daregaon, atleast to attend the function of death anniversary of his father. The function was to be arranged on 5.8.2009. Due to such request, the deceased went to Daregaon with the accused on 3.8.2009. She had taken few clothes like Saris with her as she was expected to stay in the matrimonial house for few days.

3. On 6.8.2009 the complainant Ashok contacted his aunt, sister of accused, who is resident of Aurangabad, on phone. Smt. Padmabai, the aunt, informed on inquiry that accused had brought the deceased to Aurangabad on 6.8.2009 as the deceased was to take treatment in Dhoot Hospital, Aurangabad, but immediately after the treatment the deceased had returned to village Daregaon with the deceased. The aunt also informed that the accused had quarrel with the deceased in Aurangabad.

4. On 28.3.2009 Ashok and his maternal uncle Laxman went to Daregaon to see Vimalbai. They found that the door of the house -"Wada" of the accused was in locked condition. From there they went to Aurangabad, to the house of Tulshiram, the brother of accused. Tulshiram was not at home. His wife was there and she informed that 8-10 days prior to 23rd August, the accused alone had come to her house. He had stayed there for 2 days and then he left her house. She informed that there was no talk about Vimalbai. As Ashok and his uncle could not see Vimalbai., they became anxious and they started searching for Vimalbai. in the houses of their relatives. They could not trace both the accused and deceased in the houses of their relatives.

5. On 2.9.2009 when Ashok was searching for the deceased, he noticed that the accused was present in a mini goods carrier near village Kapuswadi. The complainant made inquiry with the accused about Vimalbai. The accused told that Vimalbai was staying in Aurangabad. When the complainant asked, the accused gave address of Vimalbai from Aurangabad and he also gave contact phone number. Ashok was not sure about the information supplied by the accused and therefore, Ashok asked the accused to take him to Vimalbai. The accused then said that he would go ahead in taxi to Aurangabad and Ashok should follow him on his motorcycle. Ashok followed the taxi, jeep on which the accused has boarded. When the jeep reached Aurangabad, Ashok went near the jeep, but he found that accused was not present in the jeep. The driver of jeep informed that accused had got down from the jeep on the way at Bidkin. Ashok tried to find out the place of which address was given by the accused, but he found that the address was bogus. The phone number given by the accused viz. 155581 was of no use as no such number is given in Aurangabad. Ashok then had suspicion that there was some foul play. Ashok went to Daregaon, but he

found that door of Wada of accused was still in locked condition.

6. Ashok returned to Kham-pimpri and he narrated the incident to maternal uncle and also to his brothers. On 5.9.2009 Ashok went to M.I.D.C. Police Station, Paithan and narrated the incident to police. Police went to Daregaon with Ashok and in the presence of panch witnesses of Daregaon, police broke open the lock of the door of Wada of accused. There were three rooms inside of Wada and all the three rooms were found to be locked. The three locks were also broke open. In one of the three rooms, the dead body of Vimalbai was lying. Ashok identified the dead body. The clothes, which Vimalbai had taken with her, were on the dead body. The dead body was in decomposed condition. On 5.9.2009, first A.D. was registered and then crime was registered on the basis of report given by Ashok.

7. Inquest panchanama was prepared on the spot and police arranged for conducting the P.M. examination on the spot. Doctor, who conducted the P.M. examination, noticed that there were fracture injuries on mandible and maxilla and they were anti mortem in nature. Viscera was preserved. The spot panchanama was also prepared in the presence of panch witnesses by police. On one wall of the room, where the dead body was lying, blood stains were noticed and blood stains were collected with the plaster of wall. The blood was noticed on the mattress and bed sheet. One Shawl having blood stains was also collected. In one room, there was one big ditch and earth excavated for digging the ditch was still in the room. Articles like spade and pickaxe were lying near the heap of soil. These articles were also taken over.

8. During the course of investigation, police recorded statements of neighbours of accused. It transpired that the deceased had come to the house of accused for the function of death anniversary and she was seen in the house on 5.8.2009. Police collected the record of Dhoot Hospital. It transpired that the deceased had visited Dhoot Hospital, Aurangabad on 6.8.2009.

9. On 17.9.2009 police received information about the accused and the accused came to be arrested when he was travelling in a bus. While in police custody, the accused gave statement to police about the stone used as a weapon and about his clothes which had blood stains. A stone which was underneath of the heap of soil, which was noticed in the second room, was produced by the accused and from one suitcase accused produced a shirt and a pant having blood stains. These articles came to be seized under panchanama.

10. During the course of investigation, viscera and the articles taken over during investigation came to be sent to C.A. Office. Blood was detected on the clothes of the accused and also on Shawl which was taken over from the spot of offence. Blood was detected on the earth sample, the plaster of wall taken over from the room where the dead body was lying. No poison was detected in the viscera. In view of these circumstances, charge sheet came to be filed for aforesaid offence against the accused.

11. In Trial Court prosecution examined in all 11 witnesses. The prosecution case rests entirely on circumstantial evidence. The Trial Court has believed the witnesses and the Trial Court has held that the relevant circumstances established by the prosecution are sufficient to infer that the accused committed the murder of Vimalbai. The Trial Court has considered the conduct of the accused of not giving explanation in respect of the incriminating circumstances.

12. In the appeal, it was mainly argued for the accused that there is no convincing evidence on the circumstance like last seen. It was submitted that the investigation was not fairly done and the investigating agency has shown the recovery of stone and blood stained clothes from the house of accused on 19th September when on 6th September police had entered that room. One more circumstance was argued like sending the copy of F.I.R. to Judicial Magistrate, First Class after six months. It was alternatively submitted that the Wada was in dilapidated condition and so the other persons had also an opportunity to murder Vimalbai. It was submitted that motive is not established and due to that, the chain of circumstances is not complete. The learned A.P.P. argued in support of the decision given by the Trial Court.

13. The accused has admitted inquest panchanama (Exh. 7), P.M. report (Exh. 9), the spot panchanama (Exh. 8) and the arrest panchanama of accused (Exh. 10). This record shows that the complainant Ashok (PW 1) identified the dead body of Vimalbai and the dead body was shown by Laxman Gaikwad, a brother of the deceased. The deceased was lying in one room of the Wada, which was in possession of accused. The statement given u/s 313 of Criminal Procedure Code ("Cr.P.C." for short) by the accused also shows that he is not disputing that the house from where the dead body of Vimalbai was recovered was in his possession. Surprisingly, the accused has further admitted that the four locks which were required to be broken for opening the Wada belong to him. One bill of electricity issued by M.S.E.B. in the name of accused is at Exh. 52. In spot panchanama meter number was noted by police. This record and the admission of the accused are sufficient to prove that the dead body of Vimalbai was found in the house of accused and the room where the dead body was lying and the entire house -Wada of the accused was in locked condition. These admitted facts and the circumstances mentioned in the aforesaid record need to be kept in mind at the time of appreciation of the oral evidence.

14. The inquest panchanama and the P.M. report show that the dead body was in decomposed condition. The dead body was lying on a mattress. On the north wall of the room, where the dead body was lying, there were blood stains. The spot panchanama shows that the plastering of the wall was collected for collecting the blood stains. The spot panchanama shows that in the second room, there was a big ditch of size 6 x 3 x 1 fts. and the earth removed after excavation was lying in the form of heap in the same room. The spot panchanama further shows that spade and pickaxe were still lying near the heap of soil and they were taken over by the police. The spot panchanama further shows that the police took over one

Shawl as it was having blood stains from the room. As the accused has admitted this record, these admitted circumstances need to be kept in mind at the time of appreciation of medical opinion and the other oral evidence.

15. The P.M. report, Exh. 9, shows that only the soft tissue was lost. The P.M. report shows that following injuries were found on the dead body :

(i) Jaw bone -mandible deformities present when washed fracture ends show infiltration staining, and

(ii) Eco fracture of maxilla on left side infiltration staining present.

In P.M. report, it is mentioned that the aforesaid injuries were anti mortem in nature. Similar injuries are mentioned in P.M. report while mentioning the injuries noticed in bucal cavity, teeth etc. The P.M. report shows that on that day viscera was collected and the opinion was reserved regarding the cause of death.

16. Dr. Vivek Khatgaonkar is examined by prosecution for 11 proving the cause of death. This doctor has deposed that on the day of incident this doctor had experience of 13 years in the medical field. He is M.B.B.S. and M.D. Medicine. He has deposed that the aforesaid fracture injuries were anti mortem in nature as there was infiltration staining at the ends of the fracture. He has given evidence that the death had taken place about 10 days prior to the date of P.M. examination. He has deposed that the opinion was reserved by him in past to see report of C.A. Office with regard to viscera and after going through the C.A. report, he is in a position to say that the death took place due to aforesaid injuries. He has given evidence that such injuries can be caused, if heavy object is hit on the face. He has deposed that if a person is in sleeping condition with face upward, such injuries can be caused by hitting stone. He has deposed that such injuries may cause hemorrhagic shock and the person dies due to hemorrhagic shock. It is already observed that the P.M. report is admitted by the defence. Not much could be brought on record during cross examination to create the probability that the cause of death may be different. This Court has no hesitation to hold that the evidence is sufficient to prove that Vimalbai died homicidal death.

17. Ashok (PW 1) has given evidence that the accused had taken Vimlabai with him to Daregaon on 3.8.2009. He has given evidence that the deceased had agreed to go to Daregaon only for attending the function of death anniversary of father of accused which was to take place on 5.8.2009. Ashok has deposed that the clothes like few Saris were taken with her by Vimalbai. He has identified the Sari which was found on the dead body of Vimalbai. as Sari that has taken by Vimalbai with her. Vishnupant Nalawade (PW 2) is resident of Daregaon itself and he has given evidence that his shop-cum-house is situated at the distance of 45 fts. from the house of accused. He has deposed that the deceased came to the house of accused at Daregaon for attending the death anniversary of father of accused. Vishnupant (PW 2) is totally independent witness and there is no reason to disbelieve this witness. Nothing is brought on the record to create any doubt

about the evidence given by Vishnupant (PW 2). His statement was recorded by police on 6.9.2009, immediately after finding of the dead body. This evidence of Ashok (PW 1) and Vishnupanth (PW 2) is sufficient to prove that the accused had taken Vimalbai to his house on 3.8.2009 and she was seen in the house of accused on 5.8.2009.

18. Ashok (PW 1) has given evidence that on 6.8.2009 he made inquiry with the sister of the accused, who is resident of Aurangabad, about Vimalbai. He has deposed that from the said 13 sister of accused, he learnt that accused and deceased had visited her house when they were present in Aurangabad on 6.8.2009 and they had also visited Dhoot Hospital, Aurangabad. It can be said that the evidence of Ashok (PW 1) on this point is hearsay in nature. The prosecution has examined Dr. Rajeev Mohgaonkar (PW 7) to prove that Vimalbai had visited Dhoot Hospital on 6.8.2009. The record created in the hospital in respect of visit dated 6.8.2009 is produced at Exh. 30. However, this evidence does not show that the doctor had seen the accused in the company of the deceased. This evidence can be used only to prove that till the visit to Dhoot hospital on 6.8.2009 Vimalbai was alive.

19. Ashok (PW 1) has given evidence that on 23.8.2009 he visited Daregaon to see his mother, but he found that the Wada of the accused was in locked condition. He has deposed that he then went to the house of brother of the accused from Aurangabad and there he learnt that only accused had come there about 10 days prior to 23rd. The wife of brother of accused, who had given this information is not examined by prosecution and so the evidence on this point is also hearsay in nature. From this evidence, it can be said that on 23.8.2009 the Wada of the accused was seen in locked condition by Ashok (PW 1). Ashok 14 (PW 1) has given evidence that on 2.9.2009 he saw the accused near village Kapuswadi when the accused was travelling in mini transport vehicle. Ashok has given evidence that he made inquiry about Vimalbai and then the accused gave him false address and false phone number. He has given evidence that he had followed the accused as he had insisted the accused that he should take him to Vimalbai. Ashok has given evidence that after reaching Aurangabad, he found that the accused had already got down from the taxi at Bidkin and the accused had given him slip. This evidence can be used only to prove the conduct of the accused.

20. Ashok has given evidence that due to the aforesaid conduct of the accused, he had suspicion and so on 5.9.2009 he went to police station with his relatives to give report. Ashok has then given evidence that the lock on the door of Wada of the accused was broke open and three locks of three different rooms of Wada of accused were also broke open. One Navnath Nalawade (PW 4) of Daregaon is examined. He acted as a panch witness when police broke open these locks. The panchanama is proved as Exh. 21. On this point, there is also the evidence of Police Head Constable Subhash Shejwal (PW 6). As the accused has admitted that he was out of station and the doors were locked by him, there is no need to

discuss this evidence more.

21. It was argued for the accused that the evidence also shows that on one side a wall of Wada was found in dilapidated condition and so it can be said that others had also an opportunity to commit the murder. This submission is not acceptable as the evidence of the aforesaid witnesses and the two panchanamas show that the three rooms were found locked and the walls of 3 rooms were not in dilapidated condition. The hand sketch map prepared by the police and the evidence given by the witnesses show that it was not possible for any other person to enter the room where the dead body was found. Thus the evidence on record is sufficient to prove that on 5.9.2009 when police opened the Wada and the room where the dead body was found, this premises was in possession of the accused and there were locks which were put on the main gate and on by the accused.

22. Raosaheb Jadhav (PW 3) is examined by prosecution to prove that accused gave statement after his arrest about the weapon and about the clothes having blood stains. The memorandum of statement is duly proved as Exh. 17. Jadhav (PW 3) has given evidence that the accused had taken the police and panchas to his house and from there he produced one stone and his clothes like shirt and pant. Ashok Mugdiraj (PW 11), the Investigating Officer, has also given evidence on memorandum of the statement of accused and on the recovery of these incriminating articles. The accused was arrested on 17.9.2009 and this recovery was made within 2 days by the police. Blood stains were found on the clothes. Office Copy of covering letter sent to C.A. Office and the C.A. reports in respect of the muddemal property show that blood was detected on the shirt and the pant recovered by police u/s 27 of the Evidence Act. Surprisingly, the accused has admitted the recovery of articles like his clothes, shawl etc. from his house in the statement u/s 313 of Cr.P.C. These are certainly incriminating circumstances. Though no blood was detected on the stone, this circumstance has not created reasonable doubt about the case of prosecution.

23. The aforesaid evidence is sufficient to infer that Vimalbai, wife of accused, was murdered in the house of accused. The murder took place between 6.8.2009 and 23.3.2009. The evidence shows that only accused and Vimalbai were living in that house at the relevant time. The Wada and room where the dead body was found were in locked condition and locks were put on by the accused. In view of these circumstances, this Court holds that inference needs to be drawn against the accused.

24. Section 106 and 114 of the Evidence Act show that when there are aforesaid circumstances, the burden is on the accused to explain the things. The accused has not offered any explanation regarding the murder of Vimalbai in his house.

25. In the case reported as Trimukh Maroti Kirkan Vs. State of Maharashtra, the Apex Court has made following observations with regard to the provisions of sections 106 and 114 of the Evidence Act.

14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offense at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland vs. Director of Public Prosecution*, 1944 AC 315 quoted with approval by Arijit Pasayat, J. in *State of Punjab Vs. Karnail Singh*, .) The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads :

(b) A is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him.

15. Where an offense like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of section 106 of the Evidence Act, there will be a *Cri. Appeal No. 456/10* corresponding burden on the inmates of the house to give a cogent explanation as to how the crime is committed. The inmates of the house cannot get away by simply keeping quite and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

21. In a case based on circumstantial evidence where no eye witness account is available, there is another principle of law which must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. This view has been taken in a catena of decision of this Court. (See *State of Tamil Nadu vs. Rajendran*, 1999 (8) SCC (Para 6); *State U.P. Vs. Dr. Ravindra Prakash Mittal*, ; *State of Maharashtra Vs. Suresh*, ; *Ganesh Lal Vs. State of Rajasthan*, and *Gulab Chand Vs. State of Madhya Pradesh*,].

26. For appellant some reported cases were cited. In the case reported as AIR SC 2011 QUARTER -3 (JAN-SEP) [*Varun Chaudhary Vs. State of Rajasthan*],the

Apex Court has discussed the principles which need to be followed for appreciation of circumstantial evidence. In the case reported as 2003 ALL MR (Cri) 1896 [State of Maharashtra Vs. Bhalchandra Nemgonda Chougule & Anr.], this High Court has discussed the circumstantial evidence of that case and also the principles laid down by the Apex Court for consideration of circumstantial evidence. It is observed that the chain of circumstances must be complete and the circumstances must unequivocally point to the guilt of the accused and exclude any hypothesis consistent with his innocence. It is observed that any missing link may be fatal to the prosecution case. In the case reported as 2011 ALL MR (Cri) 2842 [Bhagwan s/o. Ram Chandra Gaikwad vs. State of Maharashtra], this Court has discussed the importance of motive, when the case rests entirely on circumstantial evidence. This Court has gone through the facts of the three reported cases. The facts were totally different than the facts of case in hand.

27. The facts and circumstances of each and every criminal case are generally different. Though it is true that when the case rests on circumstantial evidence, each circumstance must be conclusive and must be fully established. However, it is not necessary that every one of the proved circumstance must in itself be decisive of the complicity of the accused. Whether the facts, circumstances established by the prosecution complete the chain to point finger to the accused will depend upon the facts of that case. While deciding the question of sufficiency, what the Court has to consider is, the total cumulative effect of all the proved facts. If the facts, if considered together, build strong and inferential case, the Court can draw the inference as available under the aforesaid provisions of the Evidence Act and the conviction can be given. In view of the facts and circumstances of the present case, this Court has no hesitation to hold that the cumulative effect of the circumstances established by the prosecution leads to only one inference that it is the accused who has committed the murder of Vimalbai. Thus, there is no reason to interfere in the decision of the Trial Court. One more circumstance like sending of copy of F.I.R. late to the Magistrate was argued. In view of the aforesaid record, this conduct of investigating agency has not created reasonable doubt about the prosecution case. There is nothing brought on record to create probability that the things are manipulated. So Cri. Appeal No. 456/10 this circumstance also cannot give any benefit to the accused. In the result, the appeal stands dismissed.