
(2013) 06 BOM CK 0076
In the Bombay High Court
Case No : Criminal Appeal No. 873 of 2009

Sitaram Hiranman Jopale

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 20-06-2013

Acts Referred:

Evidence Act, 1872 — Section 106
Penal Code, 1860 (IPC) — Section 302, 84

Citation : (2013) 4 ABR 1102 : (2013) ALLMR(Cri) 3237 : (2013) 4 BomCR(Cri) 530 : (2013) CriLJ 3588

Hon'ble Judges : V.K. Tahilramani, J; P.D. Kode, J

Bench : Division Bench

Advocate : Nasreen S.K. Ayubi, for the Appellant; P.S. Hingorani, APP, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Tahilramani, J.—The Appellant-original accused has preferred this appeal against the judgment and order dated 30th June, 2009 passed by learned Additional Sessions Judge, Nashik in Sessions Case No. 181 of 2005. By the said judgment and order, the learned Sessions Judge convicted the appellant u/s 302 of IPC and sentenced him to RI for life and to pay a fine of Rs. 1,000/- in default RI for three months. The prosecution case briefly stated, is as under:

Deceased Bharati was daughter of PW 2 Palvi. Bharati was married to the appellant about 15 years prior to the incident. They had two daughters and a son. The appellant was doing nothing and was jobless. The appellant had a piece of land but he was not cultivating it. Hence Bharati, wife of the appellant used to call her father PW 2 Palvi to help her in cultivation of the land. Bharati used to tell her father PW 2 Palvi that her husband used to ill-treat her He would assault her with shoes and also gave threats to her life.

On 7th July, 2005 PW 2 Palvi had been to the house of his daughter Bharati and the appellant as Bharati had called him to assist her in cultivation. On that day,

Bharti and PW 2 Palvi had taken part in sowing rice in the field. He returned back at about 7.00 p.m. After taking dinner, all of them i.e. Bharati, minor children, appellant and PW 2 Palvi slept in one and the same room. PW 2 Palvi was sleeping at some distance from the couple.

2. At 4.30 a.m. Mangal, grand-daughter of PW 2 cried loudly, therefore, PW 2 Palvi got up from sleep. He saw that his daughter Bharati was having bleeding injury on the right side of the neck and a blood stained axe was lying near her. At the same time, PW 2 Palvi saw his son-in-law proceeding towards door. PW 2 found that his daughter Bharati was dead. Thereafter, he followed the appellant and tried to search for him but he could not find him. PW 2 Palvi then went and informed the incident to DW 1 Hiranman, who is father of the appellant and to the Police Patil. PW 2 Palvi then went to the police station and lodged his FIR Exh. 32. Thereafter, the investigation commenced. The dead body was sent for post mortem. PW 7 Dr. Mohandas conducted the post mortem on the dead body of Bharati. He found following external injuries on the body of Bharati:

i. CLW over the neck on right side laterally extending from mandible middle to lateral end of clavicle oblique direction spindle shape. Edges lacerated 13 cm x 5 cm. deep upto vertebra clotted blood present. Muscle cut carotid and other vessels cut.

ii. Fracture mandible middle region 3 cm x 1 cm upto bone.

iii. Fracture of cervical vertebra present.

In his opinion cause of death was shock due to haemorrhage due to deep injury at neck with cervical vertebra fracture.

After completion of investigation, the charge sheet came to be filed against the appellant u/s 302 of the IPC.

3. Charge came to be framed against the appellant u/s 302 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. The appellant has further taken a defence that he was insane at the time of the incident. An alternate defence has also been raised by the appellant that someone else entered the house and murdered Bharati and ran away. After going through the evidence adduced in this case and the defence taken by the appellant, the learned additional Sessions Judge convicted and sentenced the appellant as stated in para 1 above, hence, this appeal.

4. We have heard the learned Advocate for the Appellant and the learned APP for the State. We have carefully perused the judgment and order passed by the learned Additional Sessions Judge and the evidence in this case. After carefully considering the matter, we are of the opinion that the appellant assaulted his wife Bharati with an axe on the neck and caused her death.

5. At the outset, we may state that the fact that Bharati met with an homicidal

death is not disputed by the defence. There is no eye witness in the present case and the case is mainly dependent on the evidence of PW 2 Palvi, who is father-in-law of the appellant and father of deceased Bharati. PW 2 Palvi has stated that Deceased Bharati was his daughter. Bharati was married to the appellant about 15 years prior to the incident. They had two daughters and a son. The appellant was doing nothing and was jobless. The appellant had a piece of land but he was not cultivating it. Hence Bharati, wife of the appellant used to call her father PW 2 Palvi to help her in cultivation of the land. Bharati used to tell her father PW 2 Palvi that her husband used to ill-treat her. PW 2 Palvi would assault her with shoes and also gave threats to her life. On 7th July, 2005 PW 2 Palvi had been to the house of his daughter Bharati and the appellant as Bharati had called him to assist her in cultivation. On that day, Bharti and PW 2 Palvi had taken part in sowing rice in the field. PW 2 Palvi returned back at about 7.00 p.m. After taking dinner, all of them i.e. Bharati, minor children, appellant and PW 2 Palvi slept in one and the same room. PW 2 Palvi was sleeping at some distance from the appellant and Bharati. At 4.30 a.m. Mangal, granddaughter of PW 2 Palvi cried loudly, therefore, PW 2 Palvi got up from sleep. He saw that his daughter Bharati had bleeding injury on the right side of the neck and a blood stained axe was lying near her. At the same time, PW 2 Palvi saw his son-in-law proceeding towards door. PW 2 Palvi found that his daughter Bharati was dead. PW 2 Palvi followed the appellant and tried to search for him, but he could not find the appellant. PW 2 Palvi then went and informed the incident to DW 1 Hiranman, who is the father of the appellant and to the Police Patil. PW 2 Palvi then went to the police station and lodged his FIR Exh. 32.

6. Thus, the evidence of PW 2 Palvi shows that on the night of the incident only Bharati, the appellant, minor children and PW 2 Palvi were in the house. His evidence shows that at 4.30 a.m. when he got up on hearing noise, he saw that Bharati had injury on the right side of her neck and blood stained axe was lying near her. At that time, he saw the appellant proceeding towards the door. PW 2 Palvi saw his daughter Bharati was dead. Then he followed the appellant and tried to search him but the appellant could not be traced. Thus, the evidence of PW 2 Palvi shows that at the time of the incident, the appellant and deceased were in the house and immediately after Bharati was found dead with the injury on the neck, the appellant ran away from the house and could not be traced. In this view of the matter, Section 106 of the Evidence Act will come into play.

7. The evidence of PW 2 Palvi also shows that the deceased was last seen alive in the company of the appellant in their house. In such case, the appellant-accused has to explain how Bharati 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 the context of the last seen theory 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 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.

8. The conduct of the appellant of running away immediately after the incident also shows his guilt. In addition, the prosecution is relying on the evidence of PW 5 panch witness Govind Barde. This witness has deposed about the seizure of blood stained shirt which was found on the person of the appellant at the time of his arrest. The panchanama regarding the seizure of the said shirt is at Exh. 40. This shirt was sent to the C.A. and as per the C.A. report, the shirt was found stained with blood stains of "O" group. The blouse and sari of the deceased Bharati was also found to have blood stains of "O" group. This shows that the blood of the group of deceased was found on the clothes of the appellant. This is an highly incriminating circumstances which strongly goes against the appellant. In addition, the prosecution has also brought on record the motive for the appellant to commit the murder. PW 2 Palvi, who is father of deceased Bharati has stated that the appellant used to ill-treat his wife Bharati. The appellant used to assault Bharati with shoes and also gave threats to her life.

9. One defence raised by the appellant is that some other person entered into the house and murdered his wife Bharati. As far as this defence is concerned, it is noticed that the evidence of PW 2 Palvi shows that only the appellant, PW 2 Palvi, minor children of the appellant and the deceased were in the house. They were sleeping in one room in the house. There is no material to show that any robbery or attempt to commit robbery has taken place in the house of the appellant. Moreover, nothing has been brought on record to show that Bharati had any enmity with any one so as to cause that person to murder her. If an intruder had entered into the house of the appellant, the inmates of the house would have come to know. The inmates of the house would not leave the door open and go to sleep. When they went to sleep, they would naturally lock the door. In such case, it is impossible that some third person could enter the house and manage to murder Bharati. Thus, we find that this defence is not a plausible one.

10. The second defence raised by the appellant is that he was not sane at the time when the incident occurred. In order to support this contention, he placed reliance on the evidence of PW 1 Dr. Divekar. Dr. Divekar has stated that the appellant was admitted in the Mental Hospital on 9th August, 2008 and was

discharged on 12th January, 2009. The medical papers show that the appellant was suffering from paranoid schizophrenia. However, it is pertinent to note that PW 1 Dr. Divekar speaks of the period from 9th August, 2008 onwards, whereas the incident has taken place on 8th July, 2005. The incident took place almost three years prior to the admission of the appellant in the Mental Hospital. The defence also tried to rely on the evidence of DW 1 Hiranman, who is the father of the appellant. This witness has stated that prior to four years due to mental illness, the appellant was talking irrelevantly. The appellant was taken to hospital at Thane for mental illness. DW 1 Hiranman has not produced any medical papers relating the appellant. He could not state what was the nature of the illness of the appellant. He could not give the name of the doctor who treated the appellant. In fact, he could not even say where the appellant was supposed to have been treated. This witness has admitted that he did not have any documentary proof to show that the appellant was hospitalised at Thane. He further admitted that he could not give the exact date of the appellant's mental illness nor give the date of his taking the appellant to the hospital at Thane. The evidence of DW 1 Hiranman does not show that at the time of the incident, the appellant due to the unsoundness of mind was incapable of knowing the nature of the act or that what he was doing either wrong or contrary to law. On minutely going through the evidence of DW 1 Hiranman, we find that it is of no use to the defence.

11. In absence of reliable evidence of state of mind of the accused at the time of commission of the offence, plea insanity is of no avail. Similarly, the fact that the accused was not in a sound state of mind after the incident, does not mean that he was of unsound mind at the time of the incident. In any case, totality of circumstances has to be taken into account. The preceding circumstances and the circumstances that followed would also have to be taken into account. In the present case, it is seen that the appellant prior to the incident did not exhibit any signs of unsoundness of mind. PW 2 Palvi was residing in the house of the appellant. If the appellant had exhibited any signs of unsoundness of mind, PW 2 Palvi would have deposed about it. Moreover, none of the villagers, who have been examined, have stated that the appellant was of unsound mind just prior to the incident or on the day of the incident. Another fact to be borne in mind is that immediately after assaulting his wife with an axe, the appellant ran away from the house and disappeared. The appellant could not be traced by his father in law PW 2 Palvi. This act of running away immediately after the incident shows that the appellant knew the nature and consequences of the act.

12. When there is nothing to show that the cognitive faculties of the accused have been impaired so that he could not judge the consequence of what he was doing, Section 84 of IPC is inapplicable. The burden of proof regarding the mental condition of the accused at the time of commission of the offence lies on the accused. This burden cannot be discharged by mere creation of a doubt about his sanity. The accused must establish facts and circumstances from which the Court may reasonably infer that the accused was, at the time of commission

of the offence, by a reason of insanity, incapable of knowing the nature of the act, the legality of the act or whether the act done was right or wrong. This has not been done in the present case.

13. As stated earlier, for complying with Section 84 of IPC so as to relieve a person from criminal liability, the conduct of the accused in the period preceding and succeeding the act complained of as well as the conduct during and after the act, all require minute scrutiny. In *Jai Lal Vs. Delhi Administration*, , the Apex Court held that to avail the benefit of Section 84, it must be proved affirmatively by the accused that he was insane at the time of commission of the offence.

14. Having considered the evidence on record, the submissions made on behalf of the appellant and the entire circumstances attending and following the incident of murder, we are unable to opine that the appellant had succeeded in discharging the onus cast upon him by establishing the preponderance of probability that he must have been suffering from legal insanity at the time the act was committed. The evidence on record is insufficient to establish such a case. Looking to the evidence on record, we find that the appellant has not proved the defence of insanity which has been raised by him.

15. On going through the record, we find that there is sufficient evidence to connect the appellant with the crime. Thus, we find no merit in the appeal. The appeal is dismissed. At this stage, we wish to express our appreciation for the able assistance rendered by Mrs. Nasreen Ayubi, learned advocate for the appellant. We quantify her fees at Rs. 2,500/- to be paid by the High Court Legal Aid Committee.