
(2013) 04 BOM CK 0035
In the Bombay High Court
Case No : Criminal Appeal No. 551 of 2008

Smt. Alka Gopinath Dhanawade

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 04-04-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154
Evidence Act, 1872 — Section 106, 145, 157, 21, 25
Penal Code, 1860 (IPC) — Section 300, 302, 304

Citation : (2013) 4 ABR 121 : (2013) ALLMR(Cri) 3117

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

Bench : Division Bench

Advocate : B.A. Aloor, for the Appellant; M.M. Deshmukh, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

V.K. Tahilramani, J.—This appeal is directed by the appellant-original accused against the judgment and order dated 10th April, 2008 passed by the learned Ad hoc Additional Sessions Judge-6, Pune, in Sessions Case No. 215 of 2007. By the said judgment and order, the learned Sessions Judge convicted the appellant u/s 302 of Indian Penal Code and sentenced him to suffer rigorous imprisonment for life. The prosecution case, briefly stated, is as under:-

The appellant was residing with her husband Gopinath (deceased) and her children at Urali Kanchan, Pune. There used to be frequent quarrel between the appellant and her husband Gopinath. On the day of the incident i.e. on 8th October, 2006, PW 4 Sameer-son of the appellant and the deceased left the house at about 7.30 p.m. at that time, his father and mother were in house. He returned back at about 10.00 p.m. When he returned home, he saw that his mother was crying outside the house and his father was lying in an injured condition. He along with his mother i.e. the appellant went to the police chowky. The appellant then lodged F.I.R. She stated that there was quarrel as her

husband suspected her character and he threatened to kill her, she then took a "pata"/stone and she assaulted on the head of her husband. Her husband died. Thereafter investigation commenced. The dead body of Gopinath was sent for post-mortem. PW 9 Dr. Milind performed the post-mortem on the dead body of deceased Gopinath. According to the doctor, the cause of death was due to head injury and the injuries could be caused due to impact by hard and blunt object. The doctor opined that the injuries could be caused by "pata" (Article 2). Saree of the appellant was found blood stained. The same came to be seized under panchanama Exh. 21 in the presence of panch witness PW 2 Shobha. After completion of investigation, the charge-sheet came to be filed against the appellant u/s 302 of the IPC, and in due course the case was committed to the Court of Session.

2. 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. After going through the evidence adduced in this case the learned Sessions Judge convicted and sentenced the appellant as stated in para 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 learned Sessions Judge has rightly Held that the appellant assaulted her husband on the head with pata.

4. There is no eye-witness in the present case and the prosecution is relying only on circumstantial evidence. The prosecution has relied on 3 circumstances which are as under:-

(i) The deceased and the appellant were the only two persons in the house.

(ii) Immediately after the incident when the appellant came to the police station, her saree was found stained with blood.

(iii) The appellant came to the police station and she stated that she had killed her husband as he suspected her character and threatened to kill her. Pursuant to this F.I.R. Exh. 40 came to be lodged.

5. As far as the first circumstance is concerned, PW 4 Sameer and the evidence of PW 7 Shanta establishes that the appellant and the deceased were the only persons in the house at the time of the incident. PW 4 Sameer who is the son of the appellant and the deceased has stated that at 7.30 p.m. when he left the house, his father and mother were in the house. When he returned back at about 10.00 p.m. he found that his mother was crying outside the house and his father was lying in injured condition. PW 7 Shanta who was the neighbour of the appellant and the deceased, has stated that the appellant at 9.00 p.m. came to

her house to watch TV serial. Thereafter the appellant went back to her house and at that time the husband of the appellant was in the house i.e. the deceased was in the house. It is the evidence of PW 7 that the appellant and the deceased were the only persons in the house at the relevant time. In this view of the matter, Section 106 of the Evidence Act would come into play.

6. 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 decision"s, the Supreme Court has held that the principle 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.

7. In addition to the above circumstance, the prosecution has relied on the circumstance that, when the appellant came to the police station, her clothes were blood stained. PW 2 panch witness Shobha has deposed on this aspect. She has stated that the appellant was seen at the police station. She had worn yellow colour saree and white blouse and sweater. The said clothes were having blood stains. These clothes came to be seized under panchanama Exh. 21. This witness has identified the clothes in the Court.

8. The prosecution has also tried to rely on the circumstance that, immediately after the incident, the appellant came to the police station and stated that she had killed her husband by "pata"/stone by assaulting him on the head and she wanted to give her statement, but we cannot look into this piece of evidence. When the F.I.R. is given by the accused to the police officer and amounts to a confessional statement, proof of the confession is prohibited by Section 25 of the Evidence Act. No part of the confessional statement can be proved or received in evidence except to the extent which is permitted by Section 27 of the Evidence Act. The F.I.R. recorded u/s 154 of Code of Criminal Procedure is not a substantive piece of evidence. It may be used to corroborate the informant u/s 157 of the Evidence Act or to contradict him u/s 145 of the Evidence Act in case the informant appears as a witness at the trial. When the accused himself lodges the F.I.R. the fact of his giving information to the police is admissible against him

as evidence of his conduct u/s 8 of the Evidence Act and to the extent it is non-confessional in nature, it would also be relevant u/s 21 of the Evidence Act but the confessional part of the F.I.R. by the accused to the police officer cannot be used at all against him in view of the bar of Section 25 of the Evidence Act. The Supreme Court in the case of Bheru Singh Vs. State of Rajasthan, has observed that where the first information report is given by accused himself to a police officer, only those statements which are non-confessional in nature, can be looked into and the rest of the statement which amount to confession of committing the crime is not admissible in evidence. The Supreme Court further held that statements which are non-confessional in nature like motive for the commission of the crime, the presence of some witnesses and the relations of the appellant with the deceased and other facts which are non-confessional in nature can be read in the evidence. Thus, in the present case, the fact that the appellant stated before the police that she had assaulted her husband with "pata" on the head cannot at all be read in evidence. The evidence of PW 8 API Bansi shows that the appellant has stated that her husband used to consume liquor and has stated that her husband had doubts regarding her character and he had given threats of killing her. Therefore, in the course of the quarrel, she assaulted her husband with the "pata" on his head. This shows the motive for the appellant to commit the crime. As per the decision of the Supreme Court in Bheru Singh Vs. State of Rajasthan, , the motive for the commission of the crime can be read in evidence even in cases where the accused himself lodged F.I.R. The learned advocate for the appellant has placed reliance on this evidence to show that the incident had taken place during a sudden quarrel which arose as the deceased was suspecting the character of the appellant. Thereafter the deceased threatened the appellant to kill her. On account of this the appellant assaulted her husband Gopinath with the "pata" on the head. He also contended that as the incident had occurred during the sudden quarrel, the case would not fall u/s 302 of Indian Penal Code but it would be covered by Section 304, Part II or at the most Section 304, Part I of Indian Penal Code.

9. It is to be noted that the "fight" occurring in Exception 4 of Section 300 of I.P.C. is not defined in I.P.C. It takes two to make a fight. Heat of passion requires that there must be no time for passion to cool down. However, for the application of Exception 4 it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken any undue advantage or acted in a cruel or unusual manner. The fact that the accused had given only one blow with pata shows that he did not take any undue advantage or acted in a cruel or unusual manner. Looking to the fact that the incident occurred during a sudden quarrel and the nature of the injury, we are of the considered opinion that the case would not fall u/s 302 of I.P.C. but it would be covered by Exception 4 to Section 300 I.P.C.

10. The fact that the deceased was intoxicated at the time of the incident is also seen from the evidence of PW 9 Dr. Milind who has stated that the contents of the stomach of the deceased were smelling of alcohol. However, we are not

prepared to accede to the submissions of Mr. Aloor that the case would fall u/s 304, Part II of Indian Penal Code. In our view, the case would fall u/s 304, Part I of I.P.C. because we are of the opinion that the appellant did not just have the knowledge that her act is likely to cause death but in fact the appellant intended to cause the death of her husband Gopinath. We say so on the basis of the weapon used i.e. "pata", the part of the body on which the injury was inflicted, the force used while assaulting and the nature of the injury. Looking to these facts, we are of the considered opinion that the case; would fall u/s 304, Part I of Indian Penal Code.

11. Considering the evidence on record, we are of the view that Exception 4 to Section 300 applies to the facts of the present case and the appropriate conviction would be u/s 304, Part I of Indian Penal Code. Hence, the conviction u/s 302 of Indian Penal Code is set aside, instead the appellant is convicted u/s 304, Part I of Indian Penal Code. In our opinion, sentence of rigorous imprisonment of 8 years and fine of Rs. 1000/-, in default, to suffer simple imprisonment for 15 days would meet the ends of justice.

12. The appeal is allowed to the aforesaid extent. Office to communicate this order to the concerned prison Authorities and to the appellant who is in jail.