
(2016) 12 BOM CK 0135
In the Bombay High Court
Case No : Criminal Appeal No. 60 of 2015

Smt. Sheela Ravindra Nibrad

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 23-12-2016

Acts Referred:

Evidence Act, 1872 — Section 118, Section 3, Section 8
Penal Code, 1860 (IPC) — Section 300, Section 300, Section 34

Citation : (2017) 1 AIRBomRCri 625 : (2017) ALLMRCri 2107

Hon'ble Judges : B.P. Dharmadhikari and Kum. Indira Jain, JJ.

Bench : Division Bench

Advocate : Shri R.D. Dhande, Advocate, for the Appellants; Shri M.J. Khan, Additional Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Kum. Indira Jain, J.—This appeal is preferred by Appellant ? Accused against the judgment and order dated 29.11.2014, passed by the learned Ad hoc Additional Sessions Judge, Kelapur, in Sessions Trial No. 22 of 2013. By the said judgment and order, learned Additional Sessions Judge convicted the Appellants for the offences punishable under Sections 302, 201 and 203 read with Section 34 of the Indian Penal Code and sentenced the accused as under :

Sr. Nos.

Conviction under Sections.

Punishments

1.

302 r/w 34 of IPC

Imprisonment for life and fine of Rs.2000/i/ d R.I. for 6 months each.

2.

201 r/w 34 of IPC

R.I. for 3 years and fine of Rs.1000/i/ d R.I. for 3 months each.

3.

203 r/w 34 of IPC

R.I. for 1 year and fine of Rs.500/i/ d R.I. for 2 months each.

Learned Additional Sessions Judge directed that all the sentences of imprisonment shall run concurrently.

2. For the sake of convenience, we shall refer Appellants in their original status as Accused nos.1 and 2 as were referred before the trial Court.

3. Prosecution case briefly stated is as under :

i] Deceased Ravindra Nibrad was husband of Accused no.1 Sheela. They were residing at Krushnapur, Taluka Wani, District Yavatmal. The couple had two sons Vishal and Vikram.

ii] Incident occurred on 22.02.2013 between 10.00 pm and 11.30 pm. After dinner Accused no.1 Sheela and her both the sons went to sleep at about 10.00 pm. Ravindra was outside the house. At around 11.00 11.30 pm. Sheela woke up and noticed blood stains on the adjoining cot. She came out of the house and saw her husband Ravindra lying near the fencing in injured condition in a pool of blood. She also saw a big knife in the left hand of Ravindra. Sheela called the neighbourers. They found Ravindra dead. Accused no.1 reported the incident to Police Station Shirpur. She stated in the said report that some unknown person had committed murder of her husband. On the basis of report of Accused no.1 Crime No.11 of 2013 was registered against unknown person. API Mukund Kulkarni (PW8) took over investigation.

iii] Investigating Officer visited the spot and recorded spot panchanama in the presence of panchas. Knife found in the left hand of deceased, blood stained pieces of Newar, blanket, bed sheet, simple earth and earth mixed with blood came to be seized under seizure panchanamas.

iv] API Kulkarni then drew inquest panchanama and sent the dead body for postmortem to Rural Hospital, Wani through Police Constable Sanjay, B.No.1092 of Police Station Shirpur.

v] Dr. Madhuri Kamble was Medical Officer on duty. On 23.02.2013 she performed postmortem at 11.45 am. Multiple injuries were found during postmortem. Medical Officer opined cause of death due to hemorrhagic shock due to injury to heart.

vi] Investigating Officer interrogated brother and father of the deceased. They expressed suspicion on informant Sheela (Accused no.1). It was revealed during investigation that Accused no.1 had extramarital relations with Accused no.2

Raju Wasekar. This was not liked by Ravindra. Witness Dhanraj Madavi was interrogated. After recording statements of witnesses it came to the light that Accused no.1 Sheela with the help of Accused no.2 Raju Wasekar committed murder of Ravindra. Both the Accused were arrested and clothes on their person were seized. They were referred for medical examination and their blood samples were collected.

vii] The clothes of the deceased and viscera brought from the hospital produced by Police Constable Sanjay were seized and seizure memo was accordingly drawn.

viii] On 25.02.2013 statement of Vishal (PW4) a 14 year old son of the deceased and Accused no.1 was recorded. From the statement of Vishal investigating agency could come to know that he was an eye witness to the incident. Statement of Vishal under Section 164 of the Code of Criminal Procedure was recorded on 27.02.2013 by the Judicial Magistrate First Class, Wani.

ix] A letter was issued to M.S.E.D.C.L. to furnish information about existence of electric supply at the time of incident. In response to the letter it was informed by the Authority that at the relevant time there was electricity supply to the place of occurrence. Map of spot was prepared by Tahsildar at the request of Investigating Officer. Call Details Record came to be collected. Seized muddamal was sent to Forensic Science Laboratory. During investigation statements of several other witnesses were recorded. On completing investigation charge-sheet was filed before the Judicial Magistrate First Class, Wani, who in turn committed the case for trial to the Court of Sessions.

4. Charge came to be framed against the Accused under Sections 302, 201, 203 read with Section 34 of the Indian Penal Code vide Exhibit-8. They pleaded not guilty to the charge and claimed to be tried. Their defence was of total denial and false implication.

5. Accused no.1 raised specific defence that she has been falsely implicated by her brother-in-law Suresh. Witness Dhanraj was demanding two acres of agricultural land from her for accident of his sister. She refused to give the land to him. There was dispute over agricultural land between her and her brother-in-law and since she did not succumb to their pressure and demands they made false statements and compelled her son also to give false information to Police.

6. Prosecution examined in all eight witnesses to substantiate the guilt of accused. Accused examined two witnesses in support of their defence. On going through the evidence adduced by prosecution and the defence, learned Additional Sessions Judge convicted and sentenced the Appellants as stated in paragraph no.1 above. Being aggrieved thereof accused have preferred this appeal.

7. We have heard the learned Counsel for Appellants and learned Additional Public Prosecutor for State. Considering the facts and circumstances of the case, submissions made on behalf of parties, reasonings recorded by trial Court and

evidence on record, for the below mentioned reasons we are of the opinion that Appellants are responsible for committing murder of Ravindra and in furtherance of their common intention caused evidence of the offence to disappear with intention to screen themselves from legal punishment and also knowingly gave false information to Police with a view to misdirect and mislead the investigating agency.

8. Conviction of Appellants is mainly based on -

- (i) ocular evidence of a child witness Vishal (PW4),
- (ii) circumstantial evidence brought through the evidence of Dhanraj (PW5),
- (iii) recovery of blood stained clothes from the person of accused,
- (iv) seizure of blood stained knife from the spot,
- (v) factual position noticed on the spot, and
- (vi) report lodged by accused no.1 against an unknown person thereby misleading the investigating agency.

9. Vishal Ravindra Nibrad (PW4) is a child witness. Incident occurred on 22.02.2013. Evidence of Vishal was recorded in the Court on 25.03.2014. That time he was 14 years old student and selling vegetables.

10. On appreciation of evidence of child witness learned Counsel for Appellants submitted that evidence of child witness should be accepted with great caution and general principle is that testimony of such a witness is to be corroborated by independent evidence. In support of his submissions learned Counsel for Appellants placed strong reliance on :-

1] Panchhi: National Commission For Women v. State of Uttar Pradesh [(1998) 7 SCC 177]

2] State of Uttar Pradesh v. Ashok Dixit [(2000) 3 SCC 70]

3] Shivasharanappa & Others v. State of Karnataka & Ors [2013 (5) SCC 705]

11. The authorities at serial nos. 1 and 2 relied upon came to be referred in the decision of the Hon'ble Supreme Court in Shivasharanappa & Others v. State of Karnataka & Ors (supra).

12. In response, learned Additional Public Prosecutor states that there is no inherent defect in the evidence of child witness Vishal (PW4). Nothing could be brought on record to indicate any possibility of child witness being tutored. The testimony of child witness is fully substantiated by the incriminating circumstances established through evidence of Dhanraj (PW5), seizure panchanamas of the blood stained clothes of accused and weapon and in such circumstances conviction can be based solely on testimony of Vishal (PW4). In support thereof learned Additional Public Prosecutor relied upon the decision of

the Hon"ble Supreme Court in *Suryanarayana v. State of Karnataka* [2001 CRI. L. J. 705 (SC)] and submits that facts of the case before the Hon"ble Supreme Court was almost identical to the facts in the present matter.

13. We have gone through the above authorities referred by the learned Counsel for the parties. Though it is an established principle that child witnesses are risky as they are liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of evidence of child witness the Court comes to a conclusion that it is truthful and believable, totally free from tutoring then there is no obstacle in anyway not to rely upon the evidence of child witness.

14. In the case on hand before recording evidence of Vishal (PW4) learned Additional Sessions Judge ascertained that witness understands the significance of oath and thereupon administered him oath. It appears from the evidence of Vishal that he was residing with father, mother and brother Vikram at Krushnapur. His evidence shows that at 5.00 pm he returned home from school. His parents brought vegetables from the field. Along with his brother Vikram he went to sell vegetables and after selling vegetables returned home. They had meals. Thereafter his father slept on the cot. They were watching T.V. Then he and his brother also went to sleep on the cot. He states that his mother went outside the house. She again came in. She was followed by Raja (Raja Wasekar). His mother stood towards face of his father. Raja stood near the cot of father. His mother put a black bed sheet over the face of his father and Raja stabbed Suri (knife) in the chest of his father. He stated that he started weeping. His mother and Raja told him that if he narrates the incident to anyone they would kill him. Thereafter his mother and Raja lifted his father, took him out and left him near the outer gate (Kharadi). His mother started weeping and said that somebody had killed his father. Neighbourers gathered there. Police also arrived on the spot on the same day. He narrated the incident to Police.

15. Commenting upon the evidence of child witness Vishal learned Counsel for Appellants contended that statement of Vishal under Section 161 of the Code of Criminal Procedure was recorded after two days and his statement under Section 164 of the Code was recorded after four days. He submits that no satisfactory reason is given for delay in recording statement of such an important witness. According to learned Counsel reason given by Investigating Officer that child was not traceable is absolutely false as he was residing with Suresh (PW1) at the relevant time.

16. The next submission on behalf of Appellants is that statement of Vishal (PW4) was recorded in the Police Station. Investigating agency did not bother to go to his house. It is stated that Suresh (PW1) must have taken him to Police Station and in this circumstance possibility of tutoring the child witness is not ruled out. Learned Counsel for appellants submitted that reliance cannot be placed on the sole testimony of Vishal (PW4) in the absence of independent corroboration.

17. So far as delay in recording statement is concerned learned Additional Public Prosecutor relied upon the decision of the Hon''ble Supreme Court in Ranbir and others v. State of Punjab [AIR 1973 Supreme Court 1409] and submitted that delay does not necessarily make the evidence untrustworthy. It is contended that at the relevant time Vishal was with his maternal uncle and this completely overrules the possibility of tutoring by Suresh (PW1).

18. It is pertinent to note that statement of Vishal under Section 164 of the Code of Criminal Procedure was recorded by the learned Judicial Magistrate First Class. Before the Magistrate Vishal disclosed the incident in the same manner as disclosed by him to Police at the time of recording his statement under Section 161 of the Code. On meticulous scrutiny of evidence of child witness Vishal we find no material improvements, contradictions or omissions. Certain facts stated by Vishal like watching T.V. and date of incident as 23.02.2013 deposed by him in his evidence were not disclosed to Police and to the Magistrate in his statement. The omissions brought are not the material omissions and do not go to the root of prosecution case.

19. So far as manner of incident is concerned evidence of Vishal is throughout consistent. Nothing substantial could be elicited in his piercing cross examination to disbelieve his testimony. He is the real son of accused no.1 and the deceased. He has no reason to grind an axe against his own mother. If he was to tell a lie or he was tutored he would not have fairly stated that after the incident his mother started weeping and she was saying that some unknown person killed his father.

20. In the case of Suryanarayana v. State of Karnataka (supra) deceased had developed intimacy and extra marital relations with the Appellant as a result of which she gave birth to a male child. After birth of child differences arose between Appellant and the deceased. Appellant suspected the deceased having illegal connections with other persons. She was subjected to cruelty. As she was unable to bear the cruelty she left the residence of Appellant eight days prior to her death and started residing in the house of brother. On the fateful day deceased accompanied by a female child of about four years of age went to village tank in the afternoon for washing clothes. While she was washing clothes Appellant came and stabbed the deceased with knife inflicting injuries on various parts of the body. The child rushed to the house and informed her parents about the occurrence. No inherent defect was pointed out in her testimony. Evidence of child witness was corroborated by other material particulars. In these circumstances it was held by the Hon''ble Supreme Court that conviction solely on testimony of child witness is sustainable.

21. In the present case prosecution has examined in all eight witnesses. Dhanraj (PW5) is another star witness. Dhanraj stated that on the day of incident he returned home at 7.00 pm. After meals he went to sleep. He received a phone call from accused no. 2 Raja. Accused Sheela spoke to him on phone. She asked her to come to her house for some work. He went to the house of Sheela.

Dhanraj then stated that accused Raju and Sheela were present outside the house. Ravindra was sleeping inside the house on a cot. Sheela asked him for help to catch hold her husband so that he can be killed. He refused for the same and left the spot.

22. Then while he was returning after answering nature's call accused Sheela caught hold his hand and asked him that he should assist in killing her husband. He refused for the same and left the house. When he left the spot Sheela and Raju were present there. In the morning he came to know that Lahu Nibrad was murdered. He stated that Ravindra was also known by nickname as Lahu.

23. In the cross examination an attempt was made to assail the testimony of Dhanraj (PW5) on the ground of a dispute regarding agricultural land between Sheela, Ravindra and witness Dhanraj. According to Appellants Panchfula sister of Dhanraj received injuries in an accident caused by Ravindra. It is contended that as sister got injured in an accident Dhanraj was demanding two acres of agricultural land for Panchfula. It is the defence of accused that due to previous dispute Dhanraj had reasons to side the prosecution.

24. The learned Counsel for Appellants submitted that presence of Dhanraj is doubtful as the entire family was present and he did not timely inform the Police about such a serious plan allegedly disclosed by the accused. If we look into the testimony of Dhanraj (PW5) it is apparent that his evidence does not suffer from any material infirmity. He denies the previous enmity. We find no reason to disbelieve the evidence of Dhanraj (PW5) in the absence of evidence to the contrary.

25. From the evidence of Dhanraj (PW5) prosecution could succeed in establishing the presence of accused no.2 Raju and assistance sought by accused No.1 Sheela to kill her husband. Testimony of witness Dhanraj is not shattered in the cross examination. Through his evidence prosecution has brought on record clinching circumstances clearly establishing common intention of both the accused persons to kill Ravindra.

26. The next circumstance relates to seizure of blood stained clothes of the accused. C.A. report Exhibit-83 shows that clothes of accused no.1 were having blood stains of group "A". So far as clothes of accused no.2 are concerned results remained inconclusive but the blood detected was human blood. In this connection learned Counsel for Appellants submitted that accused were not immediately arrested and it is impossible to believe that for two days they were roaming with the same clothes. It has come in the evidence of Investigating Officer (PW8) Mukund Kulkarni that after witness Dhanraj was interrogated it was revealed that Sheela Nibrad with the help of Raju Wasekar had murdered her husband. He searched whereabouts of Raju Wasekar but he was not in village. Raju was arrested near Sindhi Wadhona. In their statements brother and father of Ravindra expressed doubt on informant Sheela. They informed that character of Sheela was not good and she had extramarital relations with Raju

Wasekar. After getting these clues accused were arrested and their blood stained clothes were seized. C.A. report confirms that the clothes of accused were stained with human blood. In the absence of any explanation from the side of accused regarding blood stained clothes recovered from their person we find that this circumstance too points out a finger towards the accused.

27. Spot panchanama (Exhibit-29) indicates traces of blood as stated by Vishal (PW4) in his evidence. Vishal stated that after accused Raju stabbed Ravindra with a knife both the accused lifted Ravindra and left him at the outer gate. This evidence has remained unshaken. The presence of both the accused at the relevant time is proved by (PW4) Vishal and Dhanraj (PW5). Incident occurred during night hours. Vishal could see the occurrence in the dim light. In the light of these proved facts it was for the accused to explain the circumstances in which Ravindra received injuries and died.

28. The learned Additional Public Prosecutor submitted that the facts were well within the knowledge of the accused and since accused did not explain the circumstances in which Ravindra died provisions of Section 106 of the Indian Evidence Act would come into play and inference is reasonably to be drawn that Ravindra was killed by the accused. To substantiate his arguments learned Additional Public Prosecutor relied upon the decision of the Hon''ble Supreme Court in State of Rajasthan v. Thakur Singh [2014 Crim. L. J. 4047 (SC)].

29. Needless to state that provisions of Section 106 of the Indian Evidence Act are not intended to remind the prosecution of its primary duty to prove the guilt of accused beyond reasonable doubt. It is designed to meet certain exceptional cases in which it would be impossible or at any rate difficult for the prosecution to establish the facts which are specially within the knowledge of the accused. The decision of the Hon''ble Supreme Court relied upon by the learned Additional Public Prosecutor lays down the settled position of law under Section 106 of the Indian Evidence Act.

30. Applying this principle to the facts of the present case, since Ravindra met with homicidal death in a house occupied by Sheela and presence of Raju is also proved at the relevant time very strong presumption arises that Ravindra was murdered by accused and accused alone.

31. If one looks at the report lodged by Accused No.1 Sheela it is apparent that a show was created just to misdirect and mislead the investigating agency. Even a knife was given in the left hand of the deceased just to point out that some unknown person killed the deceased. The entire show created by accused no.1 resulted into failure when truth could be elicited on interrogation of child witness Vishal (PW4), Dhanraj (PW5) and father and mother of the victim.

32. As law is settled, in a case based on ocular evidence motive does not assume much significance. Prosecution examined Suresh Maroti Nibrad (PW1) brother of Ravindra. He stated that since childhood he was knowing accused Sheela. Her behaviour was bad. Before one year of the incident she left with Babarao

Pachbhai along with minor child. She was residing with him as a wife at village Sakorli. After three months she called Ravindra. There was settlement and she came back to cohabit with Ravindra. He also states about the quarrel which took place on 22.02.2013 between Ravindra and Sheela in the field. He saw accused Raju Wasekar sitting on the cot in the house of brother Ravindra. Ravindra asked Raju not to visit his house but he did not stop visiting.

33. From the cross examination of Suresh it can be gathered that his relations with accused Sheela were not good. The question is whether this can be a ground to reject the entire testimony of Suresh (PW1). Accused examined Pradip Thawari (DW2) a witness in their defence. He is real brother of accused Sheela. From the contradictions brought in the cross examination of Pradip and proved by the Investigating Officer it is apparent that there was extramarital relations between accused nos.1 and 2. Once his father had beaten Sheela so she attempted to administer poison to her father in a food. From the evidence of Suresh (PW1) and the contradictions brought in the evidence of Pradip (DW2) it can be safely inferred that antecedents and character of accused Sheela was not clean, clear and above board. Both the accused had a motive to eliminate the life of Ravindra who was coming in their way. Thus motive is the additional link proved by the prosecution against the accused.

34. The factum of homicidal death is not seriously in dispute. Dr. Madhuri Kamble (PW6) is not cross examined on the injuries noticed by her at the time of performing post mortem. The observations in column nos. 17 and 20 of the post mortem note are not challenged. Query report regarding weapon (Exhibit 45) shows that the injuries mentioned in post mortem report (Exhibit 44) were possible with the knife. These circumstances do further strengthen the case of prosecution.

35. Accused have come with a defence that dead body was found outside the house and therefore provisions of Section 106 of the Indian Evidence Act would not attract. We do not find force in the stand taken by the accused for the simple reason that clinching evidence of child witness Vishal could not be shattered in cross examination and it is crystal clear from his evidence that he had witnessed the occurrence of incident in a dim light and saw both the accused after assault shifting Ravindra to the outer gate of the house. Spot panchanama also substantiates the case of prosecution that incident occurred inside the house. Thus the ocular evidence, incriminating circumstances stated herein above and misleading report lodged by Accused Sheela negative the defence raised by the accused that Ravindra was killed by some unknown person.

36. In the above premise and on going through the record we are of the opinion that there is sufficient evidence to prove beyond reasonable doubt that Appellants eliminated life of an innocent person with a specific motive and they are responsible for murder of Ravindra. We find no merit in the Appeal. Hence Appeal is dismissed. No costs.