
(2010) 03 BOM CK 0100
In the Bombay High Court
Case No : Criminal Appeal No. 357 of 2003

Sunil Nirmal Bisth

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 15-03-2010

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 392, 397, 449

Citation : (2010) 03 BOM CK 0100

Hon'ble Judges : V.K. Tahilramani, J;Ranjana Desai, J

Bench : Division Bench

Advocate : Sonia Miskin, for the Appellant; H.J. Dedhia, APP, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Tahilramani, J.—Through this appeal, the appellant/original accused has challenged the judgment and order dated 24th & 30th November, 1999 passed by learned Additional Sessions Judge for Greater Bombay in Sessions Case No. 1267 of 1996. By the said judgment and order, the learned Sessions Judge convicted the appellant u/s 449 of I.P.C. as also u/s 392 read with 397 of I.P.C and Section 302 of I.P.C. For the offence u/s 449 of I.P.C, the appellant came to be sentenced to suffer RI for 10 years and to pay fine of Rs. 5000/- in default to suffer imprisonment for a period of one year. For the offence u/s 392 read with Section 397 of IPC, the appellant came to be sentenced to suffer RI for 10 years and to pay fine of Rs. 10000/- in default to suffer imprisonment for one year and for an offence u/s 302 of IPC, the appellant came to be sentenced to suffer RI for life and to pay fine of Rs. 5000/- in default to suffer imprisonment for one year. Learned Additional Sessions Judge directed that all the substantive sentences to run concurrently.

2. The prosecution case briefly stated, is as under:

P.W.1 - Mahesh Suresh Walmiki was working as a servant with Doctor Mrs. Hilla Banaji (Age 73 years) since 1988. Dr. Banaji was residing alone at 22, third floor,

Cama Terrace, Altamount Road, Mumbai 400 026. P.W.1 - Mahesh used to go to the house of Dr. Banaji at 7.30 a.m. and he used to leave the residence with her at 6.00 p.m. when Dr. Banaji used to go to her dispensary.

On 02.08.1996, P.W.1 Mahesh Walmiki reported for work at 7.30 a.m. He pressed the door bell. As there was no response, he again pressed the door bell. At that time, he heard voice of male person from inside saying that "Madam aaj chutti per hain, kal aa jao" (Madam is on leave today, come tomorrow). Hence, Mahesh went down stairs and inquired with the watchmen as to whether any person visited Dr. Banaji. Both of them replied in negative. Mahesh thereafter, along with watchman Bipin Kumar returned back to the flat of Dr. Banaji and again pressed the door bell. They heard a male voice from inside saying, "Madam chutti per hain, kal aa jao". Mahesh suspected that something was wrong, hence he latched the door from outside and he came downstairs with the watchman. He, then, informed this incident to a lady friend of Dr. Banaji by name Smt. Moos who was residing nearby. Smt. Moos informed one Mr. Dastoor who was cousin of Dr. Banaji. Mahesh, then came back to Cama Terrace building. While he was standing near the gate of the building, he heard shouts "chor, chor, pakdo". He along with watchman Itbari went towards rear side of the building when they saw one person descending down by using pipeline. At the same time, they heard watchman Bipinkumar shouting "chor, chor, pakdo" from the terrace. The other watchman Itbari and one Ramesh Solanki apprehended the person who was descending down from the pipe line. Thereafter, police van came there and the person who was apprehended was handed over to the police. According to the first informant, P.W.1 Mahesh, it was the appellant who was descending down with the help of pipe line and who was apprehended and handed over to the police.

The police officer and the constable went to the flat and found that the door could not be opened. They also saw broken iron grills opposite lift and from there they saw that the window panes were broken and window was open. Police sepoy entered into the flat of Dr. Banaji from open window and opened the door of the flat. Traces of blood were noticed near bedroom of Dr. Banaji and Dr. Banaji was seen lying dead on cot. One green colour gas tube was seen around her neck indicating that Dr. Banaji was strangulated and blood was also seen oozing out from her nose and mouth. The articles in the bed room were scattered.

The police inquired with the person who was apprehended and they came to know that his name was Sunil Nirmal Bisth (Appellant) and that previously, he was working with the Doctor as a domestic servant. Thus, the prosecution case is that the appellant had committed house trespass in the house of Dr. Banaji with a view to commit robbery, as also commit murder of Dr. Banaji by causing grievous hurt resulting into her death and thereby, he has committed offence punishable under Sections 449, 392 read with Section 397 and 302 of I.P.C.

3. Charge came to be framed against the appellant under Sections 449, 302, 392 read with Section 397 of I.P.C. The appellant pleaded not guilty to the said

charge and claimed to be tried. The defence of the appellant is that of total denial. After going through the evidence adduced by the prosecution, the learned Additional Sessions Judge convicted and sentenced the appellant as stated in para 1 above. Hence, this appeal.

4. We have heard learned advocate for the appellant - original accused and learned APP for the State. We have perused the evidence as well as the judgment and order passed by the learned Additional Sessions Judge. After giving anxious consideration to the matter and for the reasons stated herein below, we are of the opinion that the judgment and order passed by the learned Additional Session Judge does not call for any interference.

5. Before advertng to the arguments advanced by both sides, we shall at the threshold point out that in the present case, there is no direct evidence to convict the accused with the offence in question and the prosecution rests its case solely on the circumstantial evidence. The circumstances relied upon by the prosecution are a) presence of accused near the scene of offence, b) the accused being seen coming down the drain pipe of the building of the deceased, c) finding of articles of deceased and large amount of cash on the person of accused immediately after the incident, d) finding of fingerprints of accused in the bedroom of the deceased, e) finding of fresh injuries on the person of the accused.

6. The star witness on whose evidence the prosecution has placed reliance is P.W.1 - Mahesh Walmiki. He is the first informant in the present case. He worked as a domestic servant at the residence of Dr. Banaji since 1988. He used to attend to the household duties in the house of Dr. Banaji from 7.30 am to 6.00 p.m. everyday. On 02.08.1996, P.W.1 Mahesh Walmiki reported for work at 7.30 a.m. He pressed the door bell. As there was no response, he again pressed the door bell. At that time, he heard voice of male person from inside saying that "Madam aaj chutti per hain, kal aa jao" (Madam is on leave today, come tomorrow). Hence, Mahesh went down stairs and inquired with the watchmen as to whether any person visited Dr. Banaji. Both of them replied in negative. Mahesh thereafter, along with watchman Bipin Kumar returned back to the flat of Dr. Banaji and again pressed the door bell. They heard the male voice from inside that, "Madam chutti per hain, kal aa jao". Mahesh suspected that something was wrong, hence he latched the door from outside and he came downstairs with the watchman. He, then, informed this incident to a lady friend of Dr. Banaji by name Smt. Moos who was residing nearby. Mahesh, then came back to Cama Terrace building. While he was standing near the gate of the building, he heard shouts "chor, chor, pakdo". He along with the watchman Itbari went towards rear side of the building when they saw that one person was descending by using pipeline. At the same time, they heard watchman Bipinkumar shouting "chor, chor, pakdo" from the terrace. The other watchman Itbari and one Ramesh Solanki apprehended the person who was descending with the help of pipe line. Thereafter, police van came there and the person so apprehended was handed over to the police. According to the first informant,

P.W.1 Mahesh, it was the appellant who was descending down with the help of pipe line and who was apprehended and handed over to the police.

7. P.W.1 - Mahesh has identified the appellant as being the person who was descending from the upper floor with the help of pipe line. Though, this witness was subject to lengthy cross-examination, nothing was elicited in the cross-examination of this witness so as to discredit his evidence. The evidence of P.W.1 - Mahesh that the appellant was so apprehended is corroborated by evidence of P.W.2 P.S.I. Kelji and P.W.9 PSI Kalkundre.

8. According to the P.W.2, P.S.I. Kelji, he was on wireless standby duty at Kemp's Corner from 8.00 a.m. to 8.00 p.m. on 01.08.1996. He received wireless call from control room that thief was apprehended by a watchman of Cama Terrace building at about 9.56 a.m. Hence, he reached Cama Terrace building and noticed that watchman and residents were coming with a person (appellant) who was handed over to the police with information that the appellant was caught while descending down with the help of pipe line. On search of the appellant, cash of over Rs. 6000/- was found with him. The clothes of the appellant also came to be seized. The appellant was referred for medical examination and three injuries were found on his body.

9. Another factor which lends support to the prosecution case that it was the appellant who had entered the house of Dr. Banaji and after committing her murder, was descending with the help of pipe line is the fact that immediately after the appellant came to be apprehended, his search was taken in presence of two panchas. One of the pancha witness is P.W. 6 - Pujari. This pancha witness has stated that while he was going from Altamount road, the police called him to act as pancha. He has stated that in his presence, search of accused was taken. In the said search, cash of Rs. 7013/-, two-three visiting cards and some other documents came to be found. The panchas witness has identified the appellant as being the very same person whose search was taken and in whose search inter alia, the following documents were found:

1. Motor driving licence of Dr. Banaji,
2. Identity card issued by the State of Maharashtra to Dr. Banaji, Membership card issued by Western India Automobile Association, Bombay in name of Dr. Banaji,
3. Membership card issued by Royal Bombay Yacht Club in name of Dr. Banaji.
4. Blood group card issued by the Breach Candy Hospital in name of Dr. Banaji and
5. Cash of Rs. 7013.

10. The very fact that these documents belonging to Dr. Banaji were found with the appellant immediately after the incident i.e. while he was descending down with the help of pipe line clearly points out to the complicity of the appellant in

the offence.

11. Another clinching circumstance which points out to the involvement of the appellant is the finding of finger print at the scene of crime by finger print expert Ashok Joshi (P.W.8). While examining the scene of offence, Mr. Joshi had developed two chance prints, one on the dressing table top glass and other on the door to the bed room. These chance prints found at the scene were compared with the specimen finger prints of the appellant sent by the police and Mr. Joshi has opined that the chance prints marked at "A" developed on the dressing table top glass was found identical with that of specimen of the appellant which is marked "A-1".

12. P.W.7 - Dr. Shinde conducted postmortem of the body of Dr. Banaji. Dr. Shinde observed the following external injuries:

1. Contusion on the right eye upper eyelid laterally 2.0 cm X 1.4 cm reddish blue colour
2. Contusion on left eye upper eyelid medially reddish blue colour 1.6 cm X 1.4 cm
3. Contusion on right external ear lobule reddish blue colour 1.6 cm X 1.4 cm
4. Contusion behind right external ear reddish blue colour 2.0 cm X 1.6 cm
5. Contusion on left side upper lip inner aspect laterally 1.6 cm X 1.4 cm
6. Neck circumference at level of thyroid cartilage 42.3 cms. Ligature mark around the neck 0.5 cm above thyroid cartilage length 40.3 cm, breadth 0.5 cm reddish blue colour with knot on the left side neck near left angle of mandible contusion of area 3.5 cm X 2.5 cm with reddish abrasions in it crossed, oblique 2.0 cm X 1.0 cm medial to lat. downwards 2.0 cm X 0.5 cm transverse ligature mark, archment like, nongrooved.
7. Abrasion red colour on right elbow back 1.4 cm X 1.3 cm
8. Abrasions red colour over left knee.
 - a. Front upper part 1.4 cm X 1.3 cm
 - b. medially front 2.6 cm X 2 cm reddish front with reddish abrasion 1.3 cm and 1.2 cm
9. Abrasions red colour over right knee.
 - a. Front upper part medially 1.4 cm X 1.3 cm
 - b. Two on front laterally 1.0 cm apart 1.4 cm X 1.3 cm and 1.2 cm X 1.1 cm respectively.
 - c. Three on laterally upper 1.1 cm X 1.0 cm middle 1.4 cm X 1.3 cm and lower 1.6 cm X 1.4 cm

10. Contusions red colour over

a. right wrist back 1.6 cm X 1.4 cm

b. right hand back 1.0 cm below index finger 1.4 cm X 1.3 cm

c. Base of index finger right hand back 1.0 cm X 0.8 cm

According to Dr. Shinde, the above injuries were ante mortem. Dr. Shinde also found the following internal injuries as follows:

Dissection of neck-Skin and subcutaneous tissue under ligature mark bluish. Bruised neck muscles underneath of ligature mark including both sternocleidomastoid muscles.

Bruised thyrohyoid membrane underneath ligature mark.

No fracture of thyroid bone/thyroid cartilage.

Retro laryngeal wall haematoma noticed. Blood into trachea and bronchi.

Epithelial haemorrhage into laryngeal mucosa, pleura pericardial.

Contusion of right occipital scalp 2.6 cm X 2.2 cm with haematoma underneath. Epithelial haemorrhage, brain was congested.

Visceral organs markedly congested.

Dr. Shinde gave opinion that cause of death was due to asphyxia as a result of strangulation (unnatural). He also opined that external injury No. 6 corresponding with internal injuries was sufficient to cause death in the ordinary course of nature. According to Dr. Shinde, ligature mark noticed around the neck was possible as a result of a rubber tube article No. 4 before the court. Dr. Shinde negated the possibility about occurrence of asphyxial death after cardiac failure. It is also pertinent to note that immediately after arrest when the appellant was sent for medical examination, the Doctor noticed injuries on his person. It is noticed that the deceased also had a large number of injuries on her person. They also indicate some struggle on her part. It is apparent that the appellant sustained injuries on account of his participation in the incident.

13. The evidence of Dr. Shinde and the other evidence on record shows beyond reasonable doubt that Dr. Banaji met with homicidal death. Hence, we have no hesitation in accepting the prosecution case that Dr. Banaji had met with homicidal death and that the appellant is responsible for the same.

14. We have already observed earlier that there are no eye witnesses in the present case and the case is based totally on circumstantial evidence. Indisputably charges can be proved on the basis of the circumstantial evidence when direct evidence is not available. It is well settled that a conviction can be based on circumstantial evidence, however, the prosecution must prove that in all human probability, the act must have been done by the accused. It is also

necessary for the Courts to remember that there is a long gap between "may be true" and "must be true". The prosecution must prove its case by leading cogent, plausible and credible evidence. The prosecution case, thus, must be judged in its entirety, having regard to the totality of the circumstances.

15. Looking to the entire evidence on record and the circumstances which have been proved by the prosecution, we do find the chain of evidence to be so complete as to show that in all human probability the act must have been done by the appellant. From the circumstantial evidence which has been brought on record, we find that the facts established are only consistent with the hypothesis of the guilt of the appellant and that the facts exclude every other hypothesis except that the appellant is guilty.

16. We find that there is sufficient evidence on record to show that the appellant has committed offence punishable u/s 449, 392 read with 397 and 302 of I.P.C. Hence, judgment and order passed by learned Additional Sessions Judge convicting and sentencing the appellant u/s 449, 392 read with 397 of I.P.C and Section 302 of I.P.C is confirmed.

17. Before we part with this judgment, we would like to record our appreciation for the able assistance of Ms. Miskin to the Court. This case was originally assigned to some other advocate from the Legal Aid Cell but as none represented the appellant - accused who has filed this appeal through jail, Ms. Miskin who was before us in another case assigned to her from the Legal Aid Panel, was appointed by us to represent the appellant in this appeal. She got prepared in the matter at very short notice and very ably argued the matter. She be paid the fees for conducting this matter as per the Rules.

18. Appeal is dismissed.