
(2006) 07 BOM CK 0133
In the Bombay High Court
Case No : Criminal Appeal No. 276 of 2001

Surendra Gyanchand Chawla	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 12-07-2006

Acts Referred:

Penal Code, 1860 (IPC) — Section 302

Citation : (2006) CriLJ 3694

Hon'ble Judges : V.M. Kanade, J;D.G. Deshpande, J

Bench : Division Bench

Advocate : C.K. Talekar, for the Appellant; P.S. Hingorani, APP, for the Respondent

Final Decision : Allowed

Judgement

D.G. Deshpande, J.—Heard advocate Mr. Talekar, appearing for the appellant - original accused and learned APP Mr. Hingorani, appearing for the State in Chamber.

2. By this appeal, the accused has challenged his conviction u/s 302 of the Indian Penal Code and sentence of imprisonment for life and fine of Rs. 10,000/- in default R.I. for six months, imposed upon him by the Addl. Sessions Judge, Gr. Mumbai in Sessions Case No. 1033 of 1995.

3. The facts giving rise to the prosecution case are as under:

Deceased Seema was the wife of accused. She was the first wife. Charge against the accused was that the accused killed his wife deceased Smt. Seema Surendra Chawla by strangulation. The accused had two children by name Kamlesh and Lalit. They were aged about 20 years and 12 years respectively at the time of incident. The accused, deceased Seema and their two sons were living at Room No. 1, Chawala Chawl, Irani Wadi, Road, No. 4, Kandivali (W). Even according to the prosecution, the accused had a mistress or second wife by name Vijaya. The accused used to go to her house and stayed in her house in the night time. The

accused had two sons from Vijaya and they were of the same age as the children of Seema.

4. On 24.4.1995 at about 6.00 p.m. the accused placed order to grocery shop for certain articles. Accordingly the articles were sent to the house of accused i.e. to Seema. At that time Seema was not there. Therefore, those items were kept in the house neighbour (PW 13) Smt. Radiyatben Chavan. After some time, Seema went to her house and brought the articles to her home. List of the grocery articles was in Gujarathi. Deceased Seema did not understand Gujarathi. Therefore, PW.9 Varsha Trivedi, who was present with Seema, read the list and told Seema that out of total amount of Rs. 702/-, only Rs. 200/-were paid and Rs. 502/- was shown as balance. This made Seema agony and she told the servant of PW 3 - the grocery shop owner, to take back the grocery articles.

5. On the same day at about 8.00 p.m. the accused went to the shop of P.W. - Bhavanji Savla and requested him to send those articles to the house of accused. At that night Kamlesh and his brother Lalit went to their grand-father's house for sleeping and only accused and deceased Seema remained in that house, as per the prosecution case.

6. On the next day morning on 25.4.1995, at about 6.45 a.m. the accused went to the house of PW.2 Jayantilal Jethawa with Narayan (PW 7) and informed him that his wife has taken poison and is serious. P.W.2 Jayantilal went to the house of accused and examined Seema and found that she was dead.

7. Then, according to the prosecution, at about 7.30 a.m. the accused went to the house of Dr. Pankajkumar Shah (PW 6) and told him that his wife had strangled herself by hanging and also told him as to how did it happen. Then P.W.6 Dr. Shah shown his inability to do anything in the matter and advised him to approach his family members and parents. Then at 8.00 a.m. the accused went to his father's house at Kandivali, where both of his sons were sleeping. The accused told them about the death of Seema. Kamlesh (PW 5) asked the accused as to how did it happen. The accused is alleged to have narrated. Then Kamlesh (PW 5) and Lalit with their grand father went to the house of accused and found that his mother lying dead on floor. Thereafter Kamlesh, with the help his grand-father, put Seema on the mattress and bed sheet. Various injuries noted on her neck, face and other parts of her body.

8. P.W.1, Dona, the sister of deceased Seema was received information about the death of Seema from her other sister Penny. Both of them rushed to the house of accused. P.W.1 found that Seema was dead and she noticed several injuries on Seema's face, mouth, neck and other parts of her body. The accused was not found in the house. Thereafter P.W.1 reported the matter to the Kandivali Police Station at about 11.30 a.m. and C.R. No. 152/95 u/s 302 of the Indian Penal Code was registered. Detailed investigation was carried out. Panchanamas were made. Articles from the house of accused were seized. Dr. Marathe (PW 4) conducted the post-mortem. He found anti mortem external injuries as well as

ligature marks on the neck of Seema and also found corresponding internal injuries. Statements of witnesses were recorded. Muddemal articles were sent to the Chemical Analyser. The accused was arrested on 26.4.1995. Four abrasion injuries were found on his person. His blood and nail clippings were sent to CA. In this background, the accused came to be tried.

9. The prosecution examined 15 witnesses. The accused also examined two witnesses in his defence. The defence of the accused was of total denial. According to him, it was a case of suicide and not homicidal death. The trial Court accepted the story of the prosecution and disbelieved the defence and convicted the accused. Hence this appeal.

10. The learned advocate Mr. Talekar, appearing for the accused, contended that firstly the cross examination of the doctor conducting post mortem has nullified the entire prosecution case of murder. He urged that the doctor has admitted that in case of strangulation, there would be complete ligature marks around the neck with the marks of knot and in case of hanging the marks would not be straight but they would be horizontal with the side of knot upwards towards the skull, as has been found in the present case. The learned advocate Mr. Talekar further contended that the fact that the accused was having two wives was an accepted fact by both the wives and their children and, there is no evidence of any ill-treatment by the accused to deceased Seema. According to him, the accused had no motive to kill Seema for any reason whatsoever. Secondly, he pointed out that even if the prosecution case is accepted as it is, that is the evidence of witnesses, it was clear that every witness was giving different story. This, according to advocate Mr. Talekar, was sufficient to create doubt about the entire prosecution case and, the benefit of doubt was required to be given to the accused.

11. Mr. Talekar, appearing for the accused, further pointed out that there is no evidence that the accused slept with Seema on that night in that house. There was no witness from the prosecution side to justify about this fact. Thirdly, the theory of the prosecution that the accused might have entered the room where Seema was sleeping by breaking open the small window above the door was falsified by the panchanama wherein it is clearly mentioned that there were horizontal iron bars in the said window which was a very small window. Mr. Talekar pointed out that even if glass pane of the said window was found broken and the glass pieces were scattered in the room, it was not possible for anybody to enter the room through window.

12. The advocate Mr. Talekar, appearing for the accused further contended that if the accused had strangled Seema, then admittedly there would have been resistance by deceased Seema and consequent injury upon the body of the accused and, even if, according to the prosecution, there were certain injuries, advocate Mr. Talekar contended that the evidence in that regard was doubtful.

13. Mr. Talekar, appearing for the accused, laid great emphasis on the evidence

of PW-7 Narayan Pandurang Pokle and contended that evidence of this witness totally falsified the prosecution case. Mr. Talekar also contended that when there was no direct evidence in the case and the case was based on circumstantial evidence, then this was not a case for conviction of the accused. Because there were many doubtful and suspicious circumstances brought on record for which the prosecution had no explanation. He, therefore, urged that the appeal of the accused was required to be allowed and the accused was entitled for acquittal.

14. Since the main attack of Mr. Talekar is on the evidence of P.W.7 Narayan Pokle, [for supporting the case of the accused], we will consider the evidence of P.W.7 Narayan. Narayan Pokle is a young man of 27 years of age. He was examined by the prosecution. He has stated that he was knowing the accused because he had worked with him and Vijaya, the wife of accused, was residing in his neighbourhood. He has stated that on 24.4.1995 he returned back home at 8.30 p.m. from work. He had meals and went to purchase Paan i.e. Mava. At that time Vijaya, the wife of accused, called him to her house. This witness went to the house of Vijaya where the accused was present. The accused gave him Rs. 100/-and asked him to bring liquor (Green Label- Quarter). This witness (Narayan) insisted the accused that he would take beer. Therefore, the accused consented. Thereafter this witness purchased one bottle of Green Label quarter for Rs. 120/-and cancelled to purchase beer. Then both, the accused and Narayan consumed whisky up to 12.45 a.m. Then Narayan went to his house and the accused remained in Vijaya's house. According to this witness (PW 7), at the dawn time, Vijaya came to his (PW.7) house and told him that he should wake up Surendra (the accused) because somebody had come from Surendra's Chawl. Then Narayan went to the house of Vijaya; woke up the accused and then both of them went to the house where Seema was staying and then found that Seema was lying on the floor in the house. Then doctor was called and after checking, the doctor declared that Seema was dead. Then, according to this witness, he and Surendra went to the house of father of the accused.

In the cross examination, this witness (PW 7) admitted that the accused had consumed more liquor and he was under the influence of liquor. He was unable to stand and walk and incapable of taking his own care and the accused slept in the house of Vijaya in the same condition. He also stated that when he went to the house of accused in the next day morning at dawn time, he found that Surendra was sleeping in the same place where he had slept in the night.

15. Mr. Talekar contended, with reference to the evidence of this witness (PW-7 Narayan), that the evidence of this witness fully disproves the case of the prosecution. Firstly, he proves that the accused had consumed whisky; that he was under the influence of liquor; incapable of taking care of himself; that both Narayan and the accused were together up to 12.45 midnight and the accused was found sleeping at the same place where Narayan had left him and, therefore, in such a situation it was impossible that the accused would go to the house of Seema, break open the pane of window, enter the house through the said

window, strangle his wife in order to kill her.

16. Since P.W.7 Narayan is examined by the prosecution as their own witness, it cannot be permitted to disown his testimony. This witness was not declared hostile; nor he was cross examined by the prosecution with the permission of court; no satisfactory reasons have been given by the trial court for disbelieving this witness (PW 7-Narayan). In our opinion the evidence of Narayan (PW 7) alone is sufficient to create doubt about the entire case of the prosecution.

17. Mr. Talekar then drew our attention to the cross examination of P.W.4 Dr. Rajaram Narayanrao Marathe and particularly following admissions in the cross examination:

There is no mention about approximate time of death of Seema; that in the absence of the contents of the stomach, it is difficult to ascertain the time of death; that Doctor's estimation of time of death is based on assumption; there is no reason why the time of death is not mentioned in P.M. Notes; that the doctor could not come to the conclusion positively as to when deceased had her last meal; that the doctor ascertained from the I.O. about the time of death; that the injuries could be or could not be more than 48 hours old; that there was no mention in the P.M. Notes that the injuries were fresh and within 24 hours; that the instrument of causing death was not shown; that the doctor did not notice any nail-mark, scratch-marks, abrasion around the neck; that if a person wants to loose grip in case of strangulation, there would appear nail marks, scratch marks or abrasion; but no such marks were found on the wrist or both hands of the deceased; that the ligature mark was above the larynxes towards the left side i.e. it was at the larynxes level and was little upwards on the left side direction, it means it was little upper direction; that the ligature mark was incomplete; that the doctor did not find ligature being attached to suspension point; that in the case of hanging the ligature mark was many times incomplete.

This witness PW. 4 Dr. Marathe in reply to Question No. 69 agreed with the proposition of Dr. Taylor that

from the features suggested [asked in earlier question), it is difficult to determine, how the Asphyxial death has been caused and it was possibly more difficult still to demonstrate findings which can support the criminal charge.

18. We have given our anxious consideration to the submissions made by advocate Mr. Talekar, appearing for the accused. The Doctor (PW.4) was cross examined at length on technical aspects regarding difference between signs of strangulation and hanging. We have reproduced some important portions of his admissions. But after taking over all view of the evidence of Doctor we are of the opinion that the defence has succeeded in creating doubt about the case of the prosecution that Seema died as a result of strangulation. It is basic principle of criminal law that it is for the prosecution to prove a case against accused beyond reasonable doubt and, if it is a case of murder, then the prosecution must prove beyond reasonable doubt that Seema died as a result of strangulation and

strangulation alone. This test in criminal law is not satisfied by the prosecution. In any case the defence has succeeded in creating doubt about this story of strangulation particularly when the case is entirely based on circumstantial evidence, absence of motive and nobody seeing the accused in the house when Seema died on that night.

19. Advocate Mr. Talekar also pointed out that the room where Seema was staying and was found dead was a big chawl; there were about 36 tenements; all the rooms were adjoining to each other and, if the accused had committed murder of Seema, as alleged by the prosecution, then at least immediate next door neighbour would have heard some sound of agony or crying in pain and this ghastly murder could not have gone unnoticed. We find considerable force in this argument also.

20. Further from the evidence of Kamlesh (PW 5), advocate Mr. Talekar has pointed out that, according to Kamlesh when he saw his mother dead, he found that gold chain, bangles and earrings, which his mother was always wearing, were not found on her person. Mr. Talekar contended that if the accused had murdered his wife, he would not have taken away ornaments because admittedly, after her death he would have been entitled to get them. Therefore, this cannot be treated as a simple case of murder by accused, but there is something which required intelligent investigation which was lacking in this case.

21. Mr. Talekar also contended that it was most natural if Kamlesh and Lalit had slept with their mother on that night as usual. But there was no reason for the police not to record the statement of Lalit and cite and examine him as a prosecution witness. It is true that Kamlesh has stated that on that night he went to the house of his grand-father along with Lalit. P.W.5 Kamlesh has admitted that the accused was a heavy drunkard; he was taking heavy drink regularly; some times he used to fell down and he was incapable of taking care of himself and there used to be heavy fight between the accused and his mother Seema. This witness Kamlesh has stated in his cross examination that he used to generally go to the house of his grand father for sleeping and Lalit used to sleep in their house i.e. the house where Seema was living. He could not give any explanation in his cross examination in para 27 why on that night Lalit also accompanied him to the house of grand father. Witness Kamlesh also admitted that it was unusual for Lalit to go with Kamlesh to the house of grand father. This admission also creates strong doubt about the prosecution case. If Lalit was sleeping with his mother Seema, then it is impossible to believe that the accused would come and kill Seema in his presence. Witness Kamlesh is positive that Lalit always used to sleep in the mother's house and, the witness Kamlesh had no explanation why Lalit, on that particular night, went to the house of grand father.

22. From all these circumstances, it is clear that the prosecution is not unfolding the real story before the court. The attempts are made to suppress something which is relevant and bring-forth something which is inconsistent with the prosecution case.

23. Para 27 of the cross examination of P.W.5 Kamlesh is entirely devoted to this vital aspect of the matter viz. about sleeping of Lalit at grand-father's house and not sleeping with his mother on that night.

24. The prosecution has also examined Smt. Dona Wali Lodli Roberts as P.W.1 who is a real sister of deceased Seema. This witness (PW 1) has lodged FIR against the accused. She has stated that Seema was married with accused in 1972 and about the relationship of Seema with the accused. The P.W.1 has stated that in December 1972 this witness went to see Seema and she was informed by Seema that Seema was not happy with the accused and accused was not allowing Seema to visit her sister and mother. P.W.1 also stated that Seema told her that accused had illicit relations with some other woman. Then directly this witness comes to the date of incident dated 25th April 1995. She has stated that she received a phone call in her office at 9.00 a.m. from her sister Penny that Seema met with an accident and she was in the hospital. Then both of them went to see Seema. But they were not knowing in which hospital Seema was admitted. Therefore, they went to her house. There this witness saw Seema lying on the mattress; her body was covered with bed sheet. P.W.1 pulled the bed sheet and found that Seema was dead; her face was badly bruised, her neck was bleeding and it was looking like that she was strangulated; her shoulders were blue; her both the wrists were blue and there was a big red mark under her chest looking like that somebody had hit her. The accused was not present in the house at that time. On that basis, this witness (PW 1) lodged a complaint to the police. The complaint is at Exhibit 6.

25. Evidence of this witness (PW 1) is of no help to the prosecution. It does not prove any motive against the accused. The so called strained relations about which the witness has spoken and the incidents quoted are very vague and were of 1972, whereas Seema died in April 1995. Therefore, those incidents of 23 years old are absolutely stale and they do not prove any connection nor they prove the relations of the accused to be strained with Seema.

26. According to the prosecution, there were injuries on the person of accused. For proving those injuries, the prosecution has examined P.W.10 - Dr.Mr.Baburao Ambajirao Damawala. The Doctor has stated that on 27th April 1995 at about 3.45 p.m. accused Surendra Gyanchand Chawala was produced before him and following injuries were there on the person of accused:

(1) A linear Crescentic abrasion seen over right hand index finger, proximal phalanx, laterally, oblique, concavity towards front side, 1 cm. in length, dark-brown in colour, scab formed.

(2) A linear crescentic abrasion seen over right hand wrist, medially, oblique, concavity towards front side, measuring 0.8 cm. in length, dark-brown in colour, scab formed;

(3) A linear crescentic abrasion seen over right fore-arm, posteriorly, 7 cm. below right elbow joint, oblique, dark brown in colour, measuring 0.8 cm.in

length, scab formed, concavity towards upwards side.

(4) A linear crescentic abrasion seen over left wrist joint, laterally, oblique, concavity towards front side, dark brown in colour, measuring 1 cm. in length, scab formed.

27. The learned APP tried to contend that the injuries and the extra judicial confession made by the accused to the doctor (PW 10) are sufficient to connect the accused with the offence of murder. The accused, in the history given by the accused and recorded by the P.W.10, is alleged to have stated:

that he had sustained injuries over his body during struggle with his wife (deceased) on 25-4-95 at about 01=30 hrs., due to Nails of his wife.

28. The argument is strong. But the circumstances surrounding this so called confessional statement are suspicious.

29. Exhibit 24 is the memorandum given by Sr. Police Inspector of Kandivali Police Station to the Medical Officer of Nagpada Police Hospital, Nagpada, Mumbai. In that memorandum, the entire history of case has been given, so also the notings of injuries on the little finger and both wrists of the accused and a request is made to examine the accused and give opinion in that regard.

Exhibit 22 is the Medical Examination Certificate issued by the doctor (PW 10). It is a printed format wherein blanks are to be filled in by the doctor who examined the patient. There are following printed columns in Exhibit 22.

Date:

Time:

Consent:

Name:

Brought by:

C.R. No.:

Marks of Identification:

Following injuries noticed on Examination:

The alleged history given by the accused is written under the caption "Following Injuries noticed on Examination" and in the column "Marks of Identification" two identification marks are noted.

30. A perusal of Exhibit 22 -the printed format shows that it is full and complete in itself. But even then most surprisingly we find that on the blank space of Exhibit 24 the doctor (PW 10) has written many things. That portion was encircled in red and marked as Exhibit 24-A during cross examination. In this portion i.e. Exhibit 24-A the following things are written:

H/o incidence on 25-4-95 at 01=30 hrs. Surendra Gyanchand M.I. 1) Mole over fore head for (L) side. 2) Raised mole over abdomen Nail clippings done, scalp-hair collected Medically examined for injuries Blood collected for grouping & on sterilized cotton cloth.

On the reverse of Exhibit 24 the doctor (PW 10) has drawn a sketch of the hands where he found injuries.

31. The question arises before us is, if Exhibit 22 the medical certificate was full and complete in itself, then what was the necessity for the doctor to make all these notes on Exhibit 24. Further there is no satisfactory explanation why this was written on Exhibit 22 and no explanation why the sketches were not prepared separately and annexed and affixed with Exhibit 22.

32. The Medical Certificate (Exhibit 22) is not a mere medical certificate of examination of the injuries of accused, but it is also an extra judicial confession. The accused was produced at 3.40 p.m. before the said doctor. Prior to that he had met number of persons including his relatives, friends, his neighbour and doctor. He did not make any confession before any of them. His conduct, as disclosed in the evidence of these witnesses and discussed by us, does not show that at any time he expressed repentance for his act and if this is so, it is difficult to understand as to what was the necessity for the accused to make confession of guilt to the doctor who was totally stranger. From the conduct of the accused right from the time of noting the body of Seema till he was arrested by the police it is clear that he was in balance state of mind. Therefore, on this count also it is difficult to believe that the accused could have given confession to the doctor at 3.40 p.m. in the form of history of incident

33. further the circumstances noted by us from Exhibits 22, 24 and 24-A create doubt for the so called history given by the accused and, therefore, the benefit of doubt is required to be given to the accused.

34. P.W.14 -the Investigating Officer has stated that ear-ring of one ear of Seema was missing and that ear was bleeding. There was no reason to use force to get that ear-ring for the accused from the ear of his wife and, there is no reason for him to commit theft of these ornaments.

35. We cannot forget that this is a case based on circumstantial evidence. Admittedly, therefore, all the circumstances are to be of such a nature as lead to irresistible conclusion about the guilt of the accused. Not a single circumstance should be suspicious and if they are suspicious circumstances, the prosecution must remove the suspicion beyond reasonable doubt. But in our opinion the so called extra judicial confession was firstly uncalled for. It does not fit in with the conduct of the accused. It is not consistent with the conduct of the accused. On the contrary it is totally inconsistent.

36. We have already noted that the investigation in this case is neither a par excellence nor an intelligent investigation. Many important aspects of the matter,

as discussed above, have been left untouched by the investigating agency and benefit of all these lacunas has to be given to the accused.

37. We have considered the important aspects of the matter, as discussed above. Admittedly, this is a case based on circumstantial evidence and, the circumstances brought on record are sufficient to hold that it was the accused and the accused alone who committed murder of Seema.

1. There is no conclusive proof that Seema died homicidal death. The cross examination of Dr.Marathe (PW 4) has created strong doubt of this theory of the prosecution;

2. The accused had no motive to kill Seema;

3. There is no evidence of the accused being last seen together in the house of Seema. Admittedly, the accused had two wives and other witness Narayan has stated that the accused was sleeping with his wife Vijaya and he was awakened by Narayan and at that time the accused was heavily drunk

4. There is no explanation why Lalit, the younger brother of Kamlesh, did not sleep in the house of Seema on that night;

5. The ornaments on the person of Seema were missing when her body was found. There was no motive for the accused to commit theft of ornaments of his own wife;

6. The conduct of the accused, as reflected in the evidence, his going to the doctor, calling him to examine Seema and there was no attempt on his part to run away or escape from the spot; do not support hypothesis of the accused being guilty;

7. There is no evidence on record that the relations between the accused and deceased Seema were strained to such an extent as to give any cause for the accused to commit her murder;

8. The evidence of Narayan, discussed above, who was examined as a prosecution witness, clearly shows that he and the accused had drunk on that night, he saw the accused sleeping in the house of Vijaya and he also woke up the accused from the house of Vijaya which nullifies the case of the prosecution;

40. All these circumstances mentioned above create doubt about the prosecution case and, therefore, benefit of doubt is required to be given to the accused. For all these reasons, we pass the following order:

ORDER:

The Appeal is allowed.

The conviction and sentence of accused u/s 302 of the Indian Penal Code is set aside. The accused is acquitted of the charges levelled against him.

The accused is in custody since April 1995. He should be released forthwith, if not required in any other case.

The order of trial Court regarding Muddemal property to remain same.