

(2012) 01 BOM CK 0051

In the Bombay High Court

Case No : Criminal Application No. 5752 of 2011

The State of Maharashtra

APPELLANT

Vs

Annasaheb alias Macchindra Vaidya

RESPONDENT

Date of Decision : 20-01-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 378(3)
Penal Code, 1860 (IPC) — Section 201, 302

Citation : (2012) BomCR(Cri) 222

Hon'ble Judges : S.B. Deshmukh, J;A.M. Thipsay, J

Bench : Division Bench

Advocate : S.D. Kaldate, APP /State, for the Appellant;

Final Decision : Dismissed

Judgement

S.B. Deshmukh, J.—We have heard Additional Public Prosecutor Mr. S.D. Kaldate

2. The applicant / State, through Public Prosecutor has filed for the applicant. present criminal appeal u/s 378(i)(3) of Criminal Procedure Code seeking quashment of judgment and order of acquittal recorded by Learned Additional Sessions Judge, Sangamner, district Ahmednagar, in Sessions Case No.32 of 2007, dated 29th of July 2011 consequently acquitting the respondent (hereinafter referred to as accused -status of the respondent in Sessions Case). It is also prayed that after quashing and setting aside acquittal, respondent may be held guilty for the offences for which he was charged and be punished accordingly.

3. Crime No.58 of 2005, registered at Akole police station, was handed over to then Deputy Superintendent of Police Shri. Sanjay Patil, for investigation. In that crime, initially accused and his wife were arrested. According to prosecution, accused, while in police custody, in Crime No.58 of 2005, made a disclosure statement, that dead body of Shashikala, his sister, 07 to 08 years before his arrest, was buried at the bank of Pravara river, within the limits of village Sugaon

and he will show the said place of spot. Accordingly memorandum statement of the accused was recorded in presence of two panch witnesses. Accused allegedly lead with the panch witnesses and investigating officer pointed out the spot, within the limits of Sugaon village. It was excavated. Some human bones, alongwith skull, one saree, one blouse, one scarf, one Tulshimal were found on the spot. These articles were seized under memorandum panchanama. The human bones and skull found at the instance of accused were forwarded to Medical Officer for examination. The Medical Officer opined that those bones were the human bones. Report was received by the investigating officer P.W.11 Mr. Sanjay Patil. Thereafter, again those bones were referred to Director of Forensic Science Laboratory, Kalina, Santacruz, Mumbai. Report was received from the said authority. After finding human bones, next day, father of the accused had lodged a complaint with police. It was alleged by the complainant, father of the accused that deceased Shashikala had married to Chandrabhan Gorde and cohabited with her husband for 12 to 13 years. Shashikala, thereafter, was residing separately at Panasarwadi. She delivered a female child. Shashikala was working as Anganwadi Sevika so also doing the labour work in the village. The accused, brother of Shashikala was on visiting terms with Shashikala. Shashikala when came at village Panasarwadi had already being divorced by her husband. According to prosecution, Shashikala had received some amount from her husband. The accused was instrumental for divorce. Deceased Shashikala was wearing Tulshimal and 6 metres sari (Sahavari sari). It is also alleged by the prosecution that in the year 1988, deceased Shashikala had visited the complainant, who was residing at village Kuran Taluka Sangamner. It was a land of one Mr. Satpute. Accused was demanding money from Shashikala for purchasing a tractor, which she had received at the time of her divorce from her husband. On refusal by Shashikala, accused was enraged. Accused was addicted to bad vices. Accused previously had assaulted the complainant and wife of the complainant. Due to fear of accused, complainant-his father had left the native place prior to 20 years and was residing at village Kuran. The complainant had advised daughter Shashikala that she should not give money to accused. It is also alleged by the complainant that accused had requested the complainant that complainant should persuade Shashikala for giving money to the accused. The complainant was threatened by the accused with dire consequences. The complainant claims that on the day of Rakshabandhan, the accused visited the complainant at Kuran and told that Shashikala eloped with one person and accused is not responsible for the same. The complainant had been in search of Shashikala, however, she could not found, and therefore he went to police and lodged a report on 3rd August, 1998. Based on the said report crime no.58 of 2005 was registered at Akole police station. The complainant, on 12th of June, 2005, learnt from some persons as the news item flashed in the newspaper that accused had pointed out the place to the police, on the bank of Pravara river, in the limits of village Sugaon and on excavating, skeleton of deceased Shashikala was found and human bones and clothes were discovered at the instance of accused. Bangles and Tulshimal were identified by the complainant, as belonging

to deceased Shashikala.

4. On completion of the investigation chargesheet was filed, in the Court of Learned Judicial Magistrate First Class, Akole against the accused. Case was committed to the Court of Additional Sessions Judge, Sangamner, offence being exclusively triable by the Court of Sessions.

5. It was the defence of the accused in the trial that disclosure statement allegedly made by the accused was not voluntary and it was only on account of coercive treatment extended to him by the police. He also claimed that one place from the grave yard of Scheduled Caste and Scheduled tribes community prevailing in the limits of village Sugaon Khurd was pointed out. He also pointed out that neither recovered human bones were not of deceased Shashikala nor articles attached belonged to her. He denied the charge of murder of Shashikala.

6. On behalf of prosecution, 11 witnesses were examined to bring home the guilt of the accused. On behalf of defence, no oral evidence was adduced nor documentary evidence was produced.

7. Learned trial Judge, has considered the evidence of P.W.1 Muktaji Vaidya (Exh.8), the complainant i.e. father of the accused. P.W.2 Karbhari Waghchoure, (Exh.9) is the panch on the memorandum statement of the accused and discovery of human bones and other articles like sari, blouse, Tulshimal and bangles. P.W.3 Manda Prakash Pansare was examined at Exh. 14 who, according to prosecution, has identified the articles found alongwith human bones at the place of incident. Learned trial Judge, has also considered oral evidence of other witnesses examined on behalf of the prosecution. Learned trial Judge has noticed that there is no eye witness brought on record by the prosecution regarding alleged incident of murder of Shashikala.

Undisputedly, prosecution case is based upon circumstantial evidence. The learned trial Judge has observed that motive behind the crime in question was to get the money and gold ornaments of deceased Shashikala by the accused. Except the bare allegations of P.W.No.1-complainant, according to learned Judge there was no evidence adduced to prove that accused at the relevant time demanded money to Shashikala. It is also opined by learned trial Judge that such demand was never made in the presence of P.W.1, the complainant. Prosecution claims that complainant could know the demand by accused to Shashikala from deceased Shashikala herself. The trial Court also observed that the complainant, could not furnish details of date of demand, so also amount nor it was stated by complainant that how much amount was received by Shashikala from her husband at the time of divorce. The learned trial Judge took into account the document brought on record by the defence i.e. compromise pursis amongst deceased Shashikala and her husband in previous litigation deposit of cash amount of Rs.12,000/-and Rs.5000/-in the bank account given by husband to Shashikala for her future maintenance as well as maintenance of her daughter. Vide second memorandum statement of the accused, according to prosecution

dated 21st of June 2005 regarding gold ornaments i.e. two golden bowls, 52 versatile golden beads and four Tasu beads total worth of five grams gold in weight, was discovered. The learned trial Judge has considered the admission given by P.W. No.1 the complainant, in cross examination, that he had some agricultural land. However, admission of complainant that his land is irrigated and there is a well near the river and he had made a pipeline has also been considered by the learned trial Court. Learned trial Court inferred from the admissions of the complainant that land of the complainant definitely might have been cultivated by accused being the only son and even the fact that P.W.No.1, prior to 40 years was away from village Sugaon. The learned trial Court therefore, disbelieved the case of the prosecution that accused could have killed his sister for Rs.17,000/-and 5 gms gold. The learned trial Judge reached a conclusion that motive could not be established by the prosecution and reasonable doubt arises regarding the claim of the prosecution. Learned trial Judge has also considered suggestion of defence that accused had seen the complainant P.W.No.1 and wife of the accused in a compromising position and therefore the complainant, P.W.No.1 left native place and went to a village Sukewadi for residence. The trial Court in the absence of corroboration of the evidence of P.W.No.1, refused to believe the said evidence.

8. P.W.2 Karbhari Tabaji Wakchoure, a panch witness from the memorandum statement and discovery of human bones and incriminating articles, was considered by learned trial Judge. The submission of the accused that on the background of the prosecution case the body of Shashikala was buried under the soil for 7 to 8 years and might have been completely destroyed seems to have been accepted by the learned trial Court, so also the case regarding finding of clothes on the person of Shashikala at the time of her murder i.e. 7 to 8 years prior to the report. Learned trial Judge has observed that it was but natural to get clothes rotted if so kept on a dead body under the soil for 7 to 8 years. The discovery of the incriminating articles, clothes and bones of deceased Shashikala has been disbelieved by the learned trial Court being a doubtful circumstance. Learned trial Judge inferred that these incriminating articles might have been buried at that place prior to a very short period and, therefore, articles were found intact on excavation of the soil.

9. The learned trial Judge in para 20 has observed that even if memorandum statement and discovery of humans skeleton i.e. human bones is held to be properly proved still there is no connecting evidence to reach a conclusion that these bones were in the first place, of human being and secondly of female human being. The learned trial Judge to arrive at this conclusion has considered the report of B.J. Medical College, Pune (Exh.29). According to this report cum certificate age of deceased person was about 25 years to 35 years and no opinion could be given regarding the time of death. Report further shows that bones examined by the B.J. Medical College do not show injury marks. D.N.A. Examination was not done in the department of B.J. Medical College. Neither super imposition of skull was done in the department of said college. Learned

trial Judge has considered the evidence of P.W.11 that skull and photograph of the deceased Shashikala were sent to the Director of Forensic Laboratory, Kalina, Santa Cruz ,Mumbai for skull imposition. The report Exh.46 from the said laboratory is that " on to the photograph of the face of victim in exhibit-2, cannot be given, as photograph is unsuitable for skull super imposition." It was also observed by learned trial Court that 30 intact teeth could be discovered in excavation along with bones and it was easy for the prosecution to get the D.N.A. test done and prove the fact that bones were of deceased Shashikala. The fact that Shashikala was having a daughter has also been noticed by learned trial Court for carrying out such D.N.A. test. Such test, admittedly was not carried out by the prosecution. On this background, the learned trial Judge refused to believe in evidence of P.W.1 that bones were of deceased Shashikala.

10. Identification of clothes of deceased Shashikala discovered at the instance of accused by P.W.1 complainant and P.W.3 Manda has also been not accepted by learned trial Court for justifiable reasons. P.W.1 had lastly seen deceased Shashikala in the year 1998, however, he has identified clothes in the year 2005. This was not believed by the trial Court. The evidence of P.W.3 Manda that she could identify the clothes of Shashikala and recovered article i.e. Tulsimal was also not accepted by learned trial Court. It has been noticed by the learned trial Judge that description given to the police by these two witnesses is to be from the clothes discovered at the instance of accused. The learned trial Judge has also disbelieved the suggestion that the discovery of golden ornaments at the instance of accused from one Goldsmith Mr. Kajale. Evidence of P.W.1 and 3 shows that deceased Shashikala was wearing gold ear rings. According to learned trial Judge P.W.6 admitted that gold articles seized under memorandum panchanama were new brand articles and were un-used. Discovery of these articles from P.W.6 Mr. Kajale-Goldsmith according to learned trial Judge, is not free from doubt. The learned trial Judge in para 24 has considered the case of prosecution i.e. murder of Shashikala by throttling and report Exh.29 shows that bones were not having injury marks. According to learned trial Judge, this report falsifies case of the prosecution that accused killed his sister by dropping stone on her head without leaving injury marks on skull. For these reason learned trial Judge disbelieved the case of homicidal death of Shashikala at the hands of accused. The learned trial Judge has also recorded the findings that there is no evidence establishing identity of discovery of skull and human bones, clothes of deceased Shashikala and golden ornaments. For all these reasons, the learned trial Judge has acquitted the accused of the offences u/s 302, 201 of Indian Penal Code.

11. With the assistance of learned A.P.P. we ourselves have considered and re-appreciated the evidence of P.W.1 Muktaji Vaidya, complainant. The evidence of P.W.1 Muktaji shows that daughter Shashikala was married to Chandrabhan Gorde, she could not pull on her marital life properly and was divorced. However regarding receipt of money, at the time of divorce he was not sure as to how much amount was received by her nor he was present at the time of receipt of

said money by his daughter from her husband. Source of his knowledge regarding this fact is his daughter. He also states in his examination-in-chief that he had advised his daughter to take any decision on demand of money by accused from her. We have also noticed from para 5 of examination in chief that he perceived finding of skeleton of bones of his daughter before 2-3 years and source is the police machinery. His knowledge that his daughter was assaulted by the accused by stone on her head is received by him from the police and such information was not reported by him as F.I.R. to police. In his cross examination he admits that in the year 1992 Shashikala had delivered a child. He also admits in cross examination that he had given description of clothes and ornaments of Shashikala. He also admits that he was assaulted by accused during the night time and had left his village for food for 40 years. Regarding identification of the clothes and incriminating articles of deceased Shashikala, he admits in para 8 of cross examination that the police called him in police station and told him to identify sari of his daughter.

12. We have considered the evidence of P.W.2 Karbhari Waghchoure, a panch witness on memorandum statement and discovery panchanama Exh.12. We have noticed from the evidence of this witness that spot where allegedly dead body of Shashikala was buried, is river bed, open place. After digging soil to the extent of 7 to 8 feet human bones of different part of body including skull, sari, blouse one scarf and Tulshimaal were found. Skull was having 30 teeth. Discovery panchanama of these articles including bones is Exh.13 which is also proved by this witness. This witness has denied that he is stock panch. He denied the suggestion that at the place of incident, the dead body of one women from tribal community, namely Mukti alias Kusabai Jadhav was already buried.

13. In our opinion, P.W.2 Karbhari Waghchoure has established memorandum statement Exh.12 and discovery of human bones, clothes, allegedly hidden by accused. We are satisfied that Exh.13 discovery panchanama of human bones, incriminating articles i.e. sari, blouse, scarf and Tulshi mal is established by the prosecution. There is nothing in the cross examination of this witness to disbelieve his evidence. In our opinion, even though Exh.12 and 13 have been established, this circumstance of discovery of human bones, clothes of deceased Shashikala and other incriminating articles, is not free from doubt, because these incriminating articles and bones were dug out by the prosecution after digging the soil to the extent of 7 to 8 feet. According to prosecution this burial was 7 to 8 years prior to the date of report. If these articles were buried 7 to 8 years prior to the date of report and were buried 7 to 8 feet below the ground level, findings of these articles without destruction as claimed by the prosecution is simply inconceivable. This circumstance, according to us, cannot be considered or counted in favour of the prosecution rather it makes the case of prosecution more improbable and more doubtful.

14. The mere circumstance that clothes found at the instance of accused and incriminating articles and ornaments found at the instance of accused were

identified by P.W.3 Manda Pansare is also considered by us. We have gone through the evidence of P.W.3 Manda Pansare. In her cross examination, she has admitted that Shashikala had delivered a female child. Shashikala was pregnant when she came to her village and subsequently, had delivered a female child. She also admits that Shashikala was having one more female child. She admits that she understands only two colours i.e. red and green. Omission in her previous statement recorded by the police that Shashikala was wearing Mani-mangalsutra and gold ear-rings has been established in the cross examination. This omission, and contradiction falsify the claim of this witness that she had seen those articles on the person of Shashikala. Apart from this, from her evidence it appears that she had been to her village before 17 to 18 years of recording of her evidence. We agree with the view of the learned trial Court that after such long span of time, this witness could not have identified clothes or bangles without any identification mark to be that of deceased Shashikala. A circumstance that discovery of gold ornaments from Goldsmith, which were allegedly snatched by accused from deceased Shashikala and sold to goldsmith Mr. Kajale has been considered by us. For this discovery, prosecution has examined P.W.6 Balasaheb Ramkrishna Papal, a panch witness who has established memorandum statement of the accused Exh.21 while in police custody. This witness has also proved recovery of gold spring having two bowls, 52 versatile gold beads and 4 Tasu gold beads from shop of Mr. Kajale goldsmith. This panchanama Exh.22 has been established by this witness. In cross examination this witness has admitted that the gold articles seized under panchanama, were new brand articles, which were un-used. This admission falsifies the case of the prosecution that these golden ornaments were of deceased Shashikala who was allegedly murdered by the accused 7 -8 years prior to the report. It appears that new brand gold ornaments were brought and shown to have been discovered at the instance of accused to suit the case of prosecution.

15. We have given due consideration to the submission of learned counsel for the parties. We are in agreement the view taken by learned trial Judge that prosecution has failed to prove the guilt or offence by the accused punishable u/s 302, 201 of Indian Penal Code.

16. In our opinion, human bones discovered at the instance of the accused, even if accepted had not been proved to be of human female person and more specifically of deceased Shashikala in the absence of D.N.A. test, which was possible and or any other clinching and acceptable evidence. Discovery of clothes of deceased Shashikala and incriminating articles of Shashikala is also doubtful and this circumstance, in our opinion, also has not been established by the prosecution.

17. We are in agreement with the view taken by the learned trial Judge that prosecution has failed to establish motive especially when this is a case based on circumstantial evidence. We, therefore, are inclined to dismiss the criminal

application refusing the leave.

18. In the result, criminal application stands dismissed. Leave to file appeal is refused.