
(2015) 02 BOM CK 0165
In the Bombay High Court
Case No : Criminal Appeal No. 687 of 2005

Vijay Prabhakar Desale

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 23-02-2015

Acts Referred:

Evidence Act, 1872 — Section 106

Penal Code, 1860 (IPC) — Section 201, 302, 498A

Citation : (2015) ALLMR(Cri) 1953 : (2015) 3 BomCR(Cri) 783

Hon'ble Judges : Shalini Phansalkar Joshi, J.; P.V. Hardas, J.

Bench : Division Bench

Advocate : V.V. Purwant, for the Appellant; V.R. Bhosale, APP, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Dr. Shalini Phansalkar Joshi, J.—The Appellant, who stands convicted for the offence punishable under Section 302 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs. 1,000/-, in default to undergo further imprisonment for a period of two months, and further convicted for the offence punishable under Section 201 of the Indian Penal Code and sentenced to suffer R.I. for three years and to pay fine of Rs. 500/-, in default to undergo further imprisonment of one month, by the Judgment dated 5th May, 2005 in Sessions Case No. 138 of 2004, by the 3rd Ad-Hoc Additional Sessions Judge, Malegaon, by this Appeal, challenges his conviction and sentence.

2. Facts, as are necessary, for deciding this Appeal can briefly be stated thus :-

The marriage of Kamini, daughter of PW-1 Bhivsan Shankar Pawar and his wife PW-2 Kalabai, was performed with the Appellant about four years prior to the incident. As Kamini had no issue out of the wedlock, the Appellant used to harass and ill-treat her. Just few days before the incident, she had also approached PW-5 Dr. Mukund Karambalkar for taking medical treatment to conceive the child. In this fact situation, on 14th July, 2004, at about 5 am, she was found

strangled and burnt in the house of the Appellant. The information thereof was given to PW-7 ASI Pandurang Shewale by PW-9 Bhivsan Shewale, the neighbour of the Appellant.

3. On this information, A.D. No. 15 of 2004 was registered. PW-7 ASI Shewale then went to the spot and conducted Inquest Panchanama (Exhibit-24). He sent dead body of Kamini to Wadia Hospital for postmortem examination. Thereafter, he conducted the Spot Panchanama (Exhibit-15) in the presence of the Panchas PW-3 Bapu Pawar and PW-4 Somnath Wadage. From the spot, he collected the plastic can without the lid, the match-box and some pieces of clothes.

4. On the very day, on the complaint of Kamini's father PW-1 Bhivsan Pawar, Head Constable Karke registered C.R. No. 55 of 2004 against the Appellant and handed over investigation of the said C.R. No. 55 of 2004 to PW-11 API Nawale. He recorded the statements of the witnesses including PW-2 Kalabai, Kamini's mother, PW-9 Bhivsan Shewale and PW-10 Supabai Shinde, the neighbours of the Appellant. He arrested the Appellant, collected the Postmortem Notes (Exhibit-26) and after completion of due investigation, filed Charge-Sheet in the Court against the Appellant for the offences punishable under Sections 498A, 302 and 201 of the IPC.

5. On the case being committed to the Sessions Court, the Trial Court framed charge against the Appellant vide Exhibit-7. The charge was read over and explained to the Appellant. The Appellant denied the guilt and claimed trial, raising the defence of simple and total denial.

6. To prove its case, the Prosecution examined altogether eleven witnesses. Out of them, PW-1 Bhivsan Pawar and PW-2 Kalabai Pawar, the parents of deceased Kamini, turned hostile and not supported the Prosecution case. As a result, Trial Court acquitted the Appellant for the offence punishable under Section 498A of the IPC, whereas, convicted and sentenced him for the offences punishable under Sections 302 and 201 of the IPC, as stated above.

7. This Judgment of the Trial Court is the subject matter of this Appeal. We have heard Mr. Purwant, the learned Counsel for the Appellant, and Smt. Bhosale, the learned A.P.P. for the Respondent-State. In our considered opinion, in order to effectively deal with their rival submissions, it would be useful to refer to the evidence on record.

Homicidal Death

8. The case of the Prosecution is based on circumstantial evidence. The first and foremost circumstance on which the Prosecution has placed reliance is the homicidal death of Kamini. To prove this circumstance, the Prosecution has placed reliance on the evidence of PW-8 Dr. Bhimrao Tribhuwan, who was, at the relevant time, attached to Wadia Hospital as Medical Officer. On the requisition of Police, he has conducted the postmortem examination on the dead body of Kamini on 14th July, 2004 in between 12 o'clock to 1:30 pm. On his

examination, he found that whatever remainants of burnt clothes were found on her body, like petticoat, saree and blouse, were smelling of kerosene. He further noticed that her face was contracted and odematus, eyes partially opened, sub-congenctiver hemorrhage was present.

9. Tongue has protruded partially, out of mouth and clinched under the teeth and burnt at tip.

10. Nozal, frothy white secretion was found present.

11. Superficial burns were present over head, face and neck 9%, chest wall and abdomen wall 18%, back 18%, right thigh and lower leg 12%, left thigh and lower leg 12%, both upper extremities 18%, perinum 1%, totally 88%.

12. He has opined that all these burns were postmortem burns as there were no signs of inflamation, no blisters, no signs of bodily reaction.

13. On internal examination, he found :

Meniges and brain both were congested.

As regards neck condition, white glicening subcutaneous zone seen over right partches region, right para trachial clotted blood seen with echymosis of underlined muscle.

Throx-plura conected and was intact.

Mucosa of laryax and trachea was congested. Frothy secretion, sub-mucosal haemorrhage was present in larynx and trachea. No carbon particles were noticed.

Both lungs were congested and were frothy, odematus bleeds black fluid blood on out section.

The heart was found empty of blood and large vessel were full with blood.

Tongue protruded out of mouth and was clinched in teeth, frothy secretion was present.

Stomach was found empty and its mucosa was found congested.

All the internal organs in the abdomen were found congested.

Organs of generations were found normal i.e. uterus was of normal size, was found empty and congested.

14. According to him, cause of the death was "asphyxia due to throttling" and it has occurred 6 hours after taking last meal and 10 to 12 hours before the time of postmortem examination. He has issued the Postmortem Report (Exhibit-26) accordingly, incorporating all the observations made by him at the time of postmortem examination.

15. He has been cross-examined at length by the learned Counsel for the

Appellant on several aspects relating to cause of death. In the first place, through his cross-examination, it is brought on record that if the throttling is caused by rope, by handkerchief or by strangulation with hands, it leaves traces over the neck in the form of ligature marks and, in this case, he has not noticed any such ligature marks on the dead body of Kamini. In our opinion, the absence of ligature marks on the neck can be easily explained from the fact that her body was burnt and there were 9% burns over her head, face and neck. Naturally, the ligature marks cannot be seen on the burnt neck.

16. Further he is cross-examined to bring on record that in case of throttling by applying forceful pressure on the neck, there may be fracture to trachea or there may be abrasion or bruises on mouth, nose, cheek, forehead etc., especially, if there has been a struggle. It is also brought on record that there can be fracture of ribs and injuries to trachea and abdominal organs, if the assailant kneels on the chest or abdomen of the victim while pressing the throat. He has admitted that in postmortem examination of Kamini, he has not noticed any such signs of fractures. He was confronted with some passages in the medical books in an attempt to bring on record the possibilities that the burns were not postmortem, but antemortem.

17. In our considered opinion, however, the findings noted by him in the postmortem examination leave no scope to accept any of these possibilities, but to hold that the burn injuries were postmortem. This conclusion is based on following reasons.

(i) The first and foremost reason is that there was absence of carbon suite particles in the trachea, which is a clear sign that burns were not antemortem.

(ii) The C.A. Report (Exhibit-39) also supports the finding of postmortem examination, as the chemical analysis of the blood of deceased Kamini showed absence of carbon-monoxide.

(iii) Finding in the Postmortem Notes that there were no red lines or blisters and no signs of congestion in the skin, makes it clear that she was not alive when put on fire.

(iv) The protruding of the tongue from mouth with its tip burnt again makes it clear that it can happen only in postmortem burns.

(v) The finding of white glicening subcutaneous zone, over right partches region, right para trachial clotted blood seen with echymosis of underlined muscle, again rules out the possibility of the burns being antemortem.

18. These tell-tale signs rules out completely the possibility of the burns being antemortem.

19. Even if one considers the situation, as disclosed in the photographs (Exhibits 18 to 21) taken at the spot by PW-6 Sanjay More, the Photographer, and the Spot Panchanama, then also, it leaves no manner of doubt that the burn injuries

were postmortem and not ante-mortem. The photographs reveal that though there were some clothes hanging on the rope in the said room, that too at the lower height, they were not found to be burnt at all. If Kamini was ablaze in the said room, then the clothes, in fact, ought to have caught fire. It rules out the possibility of her sustaining the burns ante-mortem. The kerosene can and burnt pieces of the match-sticks were found on the spot.

20. Further, if Kamini had set herself ablaze or caught the fire accidentally, which was the least possibility, as the incident has taken place around 5 am in the early morning, she would have raised the shouts and attracted the attention of at-least her family members and the neighbours, but no such evidence is brought on record to that effect. Though the houses are just adjoining to one another and Prosecution has examined the neighbours, no such suggestion is put up to them that they heard the shouting from the house of the Appellant.

21. To sum up, therefore, it has to be held that the Prosecution has succeeded in proving that her death was homicidal in nature. There is every reason to accept the opinion of PW-8 Dr. Tribhuvan that first she was throttled by strangulation and then burnt.

Homicidal death while in the house of Appellant

22. Admittedly, the incident has taken place in the early morning around 5 am in the house of the Appellant. As deposed by PW-9 Bhivsan Shewale, around 5 am, in the morning, when he was sleeping in his house, the grand-mother of the Appellant came and told him that wife of the Appellant died due to burns. Hence, he went to the house of the Appellant immediately. There he found that the grand-father of the Appellant was sleeping on the ota. With the help of the torch, he went inside the house and found the corpse of Kamini lying there. Then he went back to his house and gave information of the incident to the Police.

23. There is also the evidence of PW-10 Supabai Shinde, who has deposed that at about 6 am, when she opened the door of her house, she noticed gathering of people in front of the house of the Appellant. She then came to know that Kamini was burnt.

24. PW-4 Somnath Wadage, who was the Vice-Chairman of Gram Panchayat, has also deposed that on that, day about 5 am to 5:30 am, the Appellant's grand-mother came to him, woke him up and informed him that Kamini was burnt and so he went there and found the corpse of Kamini lying in the middle room of the house in burnt condition.

25. The evidence of these three witnesses, therefore, categorically goes to prove that homicidal death of Kamini has occurred in the house of the Appellant in the early morning around 5 am. As can be seen from the evidence of PW-10 Supabai Shinde, the neighbour, she had seen the Appellant and his wife returning from the field on the previous day. There is no evidence to show that Appellant has gone out of the house at any time thereafter. Moreover, even if one considers the

time of the incident which is early morning at about 5 am, then it necessarily follows that the Appellant must be present in the house when Kamini succumbed to homicidal death. The Appellant himself has not put up any plea, either through cross-examination of Prosecution Witnesses or otherwise, that on that night he was away from the house. No such plea of alibi is raised by him. Thus, it necessarily follows that Kamini has died while she was in the custody of the Appellant in his house.

No explanation offered by Appellant

26. Once it is held as proved that Kamini was succumbed to homicidal death while in custody of her husband, in his house, then, as per Section 106 of the Evidence Act, the burden was shifted upon the Appellant to explain the circumstances which led to her death, as these facts were lying especially within the knowledge of the Appellant. In this respect, useful reference can be made to the Judgment of the Supreme Court in Trimukh Maroti Kirkan Vs. State of Maharashtra, wherein it was held by the Supreme Court that "if an offence takes place inside the privacy of a house and in such circumstances, where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused, if the strict principle of circumstantial evidence, is insisted upon by the Courts."

27. Therefore, as regards the facts which can be said to be especially within the knowledge of the accused and accused alone can offer explanation therefor, the burden will shift upon him to do so. As in the present case, when the homicidal death has happened inside the residential house of the Appellant, wherein he was also present, considering the time of the incident and no plea put up by him of being away, he is bound to offer his version as to how the occurrence had taken place. In such situation, the only persons, who can speak about the occurrence, are the deceased and the other inmate of the house. Now that she is dead, the accused and accused alone has to offer explanation. Section 106 of the Evidence Act takes care of such situation by providing that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

28. It is true that Section 106 of the Evidence Act cannot be used so as to shift the onus of proving the offence from the Prosecution to the Accused. However, in the present case, when the Prosecution has discharged its burden by bringing on record the factum of homicidal death of deceased Kamini in the house of the Appellant, at the time when the Appellant was available in the house, then it was for the Appellant to explain cause of her death. As per settled legal position, in view of Section 106 of the Evidence Act, there is a corresponding burden on the inmates of the house. It was for the Appellant, in the instant case, to give a cogent explanation as to how the crime was committed. Appellant cannot get away by simply keeping quiet and offering no explanation on the supposed premises that the burden to establish its case lies entirely upon the Prosecution

and there is no duty at all on him to offer explanation. The fact that the Appellant did not explain, as in the present case, as to how and in which circumstances the homicidal death of his wife took place thus provides an additional link in the chain of circumstantial evidence against the Appellant, as per the well crystallized position of law.

Motive

29. The submission of Mr. Purwant, the learned Counsel for the Appellant, is that in a case based on circumstantial evidence, the motive of the Appellant to kill deceased Kamini assumes significance. According to him, in the present case, the Prosecution has failed to prove it. He has submitted that PW-1 Bhivsan Pawar and PW-2 Kalabai Pawar, the parents of deceased Kamini, have not supported the Prosecution case. Both of them are cross-examined by the learned A.P.P., but nothing of substance is elicited in their cross-examination to prove that married life of Kamini with Appellant was not happy. They have denied that there was any ill-treatment or cruelty to her for not giving birth to a child. Hence, according to Mr. Purwant, the learned Counsel for the Appellant, the alleged motive is not proved by the Prosecution in the present case.

30. In our considered opinion, in the face of the overwhelming evidence on record proving the homicidal death of Kamini in the house of the Appellant and no explanation being offered by the Appellant for the same, the failure of the Prosecution to prove the motive, merely because the parents of the deceased have turned hostile for the reasons best known to them, the Prosecution case cannot be disbelieved.

31. Secondly, there is also the evidence of PW-5 Dr. Mukund Karambalkar, who has deposed about Kamini coming to his dispensary on 26th March, 2004 for treatment, as she could not conceive despite the fact that she was married for five years. According to his evidence, he has carried out pathological and sonography tests and provided her treatment, calling her for follow-up, but she did not turn up. Her parents, PW-1 Bhivsan and PW-2 Kalabai, have also admitted that even after more than four years from the marriage, she had no issue. Therefore, it is not the case that there is no evidence at all to prove the motive or the cause for the Appellant to commit her homicidal death.

32. Further contention of Mr. Purwant, the learned Counsel for the Appellant, is that the evidence of PW-3 Bapu Pawar, the Panch Witness to the spot, goes to prove that the door of the room, in which Kamini's dead body was found, was broken open. The plank of the door was lying there, though it was not seized by Police at the time of Spot Panchanama. Further it is submitted that except for this door, there was no other door to the said room, as deposed by PW-3 Bapu Pawar and also by PW-4 Somnath Wadage, another Panch to the Spot Panchanama, and, hence, according to Mr. Purwant, the learned Counsel for the Appellant, if the door was closed from inside and that was the reason why it was to be broken open, there was no possibility of the Appellant causing her death

and coming out of the room.

33. However, in this respect, the evidence of PW-9 Bhivsan Shewale goes to prove that when he visited the said spot at about 5 am, he found the door of the room was intact and there was no breakage of chain or latch of the door. Thus, immediately after the incident, when he came to the spot, he did not find that the door was broken open and the alleged plank was lying there. The Spot Panchanama had taken place at about 11 am, at which time, as per PW-3 Bapu Pawar and PW-4 Somnath Wadage, the door was found broken open and the plank was lying there. Moreover, both the Panchas to the Spot Panchanama are won over and have to be declared hostile by Prosecution. In such situation, the Spot Panchanama cannot be relied upon in the face of the evidence of PW-9 Bhivsan Shewale proving that, at 5 am, when he came there, the door was intact.

34. To conclude, therefore, we have no hesitation in coming to the conclusion that Prosecution has succeeded in proving the guilt of the Appellant for both the offences punishable under Sections 302 and 201 of the IPC, beyond reasonable doubt. The Judgment of the Trial Court convicting and sentencing him, therefore, does not call for any interference.

35. The Criminal Appeal No. 687 of 2005, therefore, holds no merit and, hence, stands dismissed, confirming the conviction and sentence of the Appellant - Vijay Prabhakar Desale for the offences punishable under Sections 302 and 201 of the IPC.