
(2023) 10 BOM CK 0049
In the Bombay High Court
Case No : Criminal Appeal No.410 Of 2017

Yuvraj Keshav Mandge

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 30-10-2023

Acts Referred:

Indian Penal Code, 1860 — Section 302
Code Of Criminal Procedure, 1973 — Section 161
Evidence Act, 1872 — Section 106

Citation : (2023) 10 BOM CK 0049

Hon'ble Judges : Vibha Kankanwadi, J; Abhay S. Waghware, J

Bench : Division Bench

Advocate : P.P. More, D.R. Korade, A.M. Phule

Final Decision : Allowed

Judgement

Vibha Kankanwadi, J

1. Present Appeal has been filed by the original accused challenging his conviction for the offence punishable under Section 302 of the Indian Penal Code in Sessions Case No.399 of 2016 on 2nd August 2017 by the learned Additional Sessions Judge, Ahmednagar.

2. Before we proceed to consider the facts in dispute, the facts which are not in dispute are taken note of. PW-1 Jitendra @ Haribhau Keshav Mandge is serving in Police Department. He is resident of Patil Vasti, Pimpri Gavali Shivar, Taluka-Parner, District-Ahmednagar. It is also not in dispute that on the date of the First Information Report (for short "FIR") i.e. 15th August 2016 he was attached to Shirur Police Station, District-Pune. Present appellant is his real brother. Both of them were married, however, on the date of incident the wives of both the brothers were not cohabiting with them. Informant Jitendra, accused Yuvraj were residing with their mother Tarabai and grand-mother (mother's mother) Anusaya Rajaram Haral. Accused was employed in Military since 2002 and on the date of incident he was posted at Kargil and he had come on leave for about 15 days.

Their father Keshav expired on 27th May 2014. They have a sister by name, Manisha Pradeep Ithape, who is married.

3. The prosecution has come with the case that on 15th August 2016 around 15.40 hours PW-1 Jitendra lodged FIR with Supa Police Station, District-Ahmednagar stating that the agricultural lands were partitioned after death of their father. Around 14 acres land stands in the name of the informant himself, 15 acres land stands in the name of the accused and about 8 to 9 acres of land was in the name of mother Tarabai. Some land was still in the name of their deceased father. After death of father, when accused came on leave, he was insisting Tarabai that she should partition the land which is in her name. He had quarreled with the mother on that count. Accused had also quarreled with mother on 13th August 2016 in the evening as the mother had not served warm Sabji (vegetable). He had not taken dinner and slept in that way. PW-1 Jitendra started around 6.00 a.m. on 15th August 2016 for flag hoisting on the occasion of independence day, in his Maruti Car towards Shirur. Tarabai, grand-mother and accused were the only persons in the Bungalow in the field. When Jitendra was returning after the ceremony, he received phone call on his Mobile given by his brother-in-law Pradeep around 9.27 a.m. Pradeep told him that there was dispute between accused and Tarabai and since then i.e. 7.00 a.m., mother is not in the house. Informant reached the farm house and called his driver Avinash Bandal for searching mother. When informant was changing his uniform, accused asked him for nail cutter. It was provided by the informant. After changing his clothes when he came outside, his grand-mother was crying in the porch. Informant asked brother i.e. accused, whether there was quarrel between him and mother and where is mother. Accused did not see towards the informant but told that there was no quarrel between them and he is not aware where mother is. Informant asked the grand-mother where the mother is and at that time grand-mother was crying and not speaking anything. Thereafter informant and his driver Avinash took search of Tarabai and they could find her at a distance of about 50 ft. in the crop of maize in supine condition. The clothes on her person were not in order. They went near her and found that there were scratch marks on her face and neck. The face was swollen and blood mixed liquid was coming out of her mouth. They confirmed that she is dead and therefore, brought her inside the house. At that time the accused told that the postmortem should not be performed but the last rites should be immediately done. Therefore, informant raised suspicion and asked accused as to whether he has committed murder of mother. Accused did not talk to him at that time and went away from the house though informant was asking him to wait. Therefore, the informant got confirmed that accused has committed murder of mother on the ground that she should give the land in partition.

4. After the FIR was lodged, the inquest panchnama was carried out and the dead body was sent for postmortem. Panchnama of the spot was carried out and the statements of the witnesses were recorded. Accused came to be arrested. The seized articles were sent for chemical analysis and after completion of the

investigation, charge-sheet was filed.

5. After committal of the case, charge was framed and trial was conducted. The prosecution has examined in all seven witnesses to bring home the guilt of the accused. After considering the evidence on record and hearing both the sides, the learned trial Judge has held that the prosecution has proved the guilt of the accused beyond reasonable doubt. The accused has been convicted for the offence punishable under Section 302 of the Indian Penal Code and had been sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.10,000/-, in default, to suffer simple imprisonment for six months. Hence this Appeal.

6. It has been vehemently submitted on behalf of the appellant that the learned trial Judge has not appreciated the evidence properly. The learned trial Judge failed to consider that with ulterior motive the informant has framed the accused. If testimony of the informant is considered, then it appears that only on the basis of some suspicion, he was making allegations against the accused. The grand-mother Anusaya was in the house but she has not been examined and even in the cross-examination of PW-1 Jitendra, he has stated that when he made inquiry with grand-mother, she categorically told that no quarrel had taken place between mother and accused in her presence. He has stated that after witnessing the dead body of the mother, especially the abrasions on the face, he suspected that some wild animal had committed the act. The medical evidence also does not support the prosecution. PW-5 Dr. Manisha Undre had noticed multiple abrasions on the face, abrasion on left side of neck 2 cm. x 1 cm. and contusion on left side of chest 3 cm. x 2 cm. She had also noticed fracture of Thyroid Cartilage, during external examination as well as internal examination. She has tried to give the cause of death as asphyxia i.e. due to throttling . But if we consider Exhibit-24 i.e. postmortem report, there is no mention of the word 'throttling', though she has stated that the death is unnatural. In her cross-examination PW-5 Dr. Manisha has given many admissions and therefore, taking into consideration her admissions, it is doubtful, as to whether she had arrived at a definite conclusion that the death was homicidal in nature. She has not ruled out the possibility that some wild animal would have caused those injuries. PW-1 Jitendra, in his cross-examination, has admitted that sometimes wild animals used to come in his field. PW-2 Avinash – driver on the tractor of PW-1 Jitendra, was the person who undertook the search of the deceased and then the dead body was found. His evidence is not sufficient to prove anything. Merely because accused did not say anything, it cannot be said that the accused is the perpetrator of the crime. PW-3 Ashwini Thorat is the panch to the inquest panchnama and PW-4 Nitin Yadav is the panch to the spot panchnama. The C.A. Reports are not supporting the prosecution. PW-6 Bharat Ingale is the carrier and PW-7 PSI Siddheshwar Gore is the investigating officer. Cross-examination of the investigating officer would show that he has not carried out the investigation properly. We cannot forget that PW-1 Jitendra is employed in Police Department. The motive is not proved at all. What the accused was asking even as per the testimony of PW-1 Jitendra was, to have mutation after the death of father. He

was already employed in Military and his posting was at Kargil. He would not have personally cultivated the land but it would have been through somebody if at all it is to be cultivated. Even though PW-1 Jitendra is in Police Department, still his conduct does not show that proper precautions were taken by him immediately after it was noticed that mother has died. Therefore, there was absolutely no evidence against the accused, yet he has been convicted and therefore, the said decision deserves to be quashed and set aside.

7. Learned Advocate for the appellant has relied on the decisions in Kiran Ashok Jadhav vs. State of Maharashtra, 2014 All M.R. (Cri.) 3850, Sharad Birdhichand Sarda vs. State of Maharashtra, 1984 AIR (SC) 1622, Durgavati Ramparvesh Sharma vs. State of Maharashtra, 2011 (2) Bom. C.R. (Cri.) 652, Bodh Raj vs. State of Jammu and Kashmir, 2002 AIR (SC) 3164 and State of Maharashtra vs. Ashok Hanmant Atkar, 2006 All M.R. (Cri.) 15, on the point, how the circumstantial evidence should be considered by the Courts of law. He also relied on the decisions in Babu vs. State of Kerala, 2010 AIR (SCW) 5105 and Prabhoo vs. State of Uttar Pradesh, 1963 AIR (SC) 1113, to show that absence of motive in a case resting on circumstantial evidence has to be viewed in favour of accused.

8. To refute the points raised on behalf of the appellant, the learned APP representing the prosecution supported the reasons given by the learned trial Judge and submitted that no doubt the case is resting on the circumstantial evidence, yet PW-1 Jitendra is the witness on the point of 'last seen together' also and the conduct of the accused. Accused had not even taken part in searching the mother. After the dead body was found, he was in hurry to get the last rites done than referring the dead body for postmortem. The said conduct on the part of the accused told by PW-1 Jitendra is supported by PW-2 Avinash. Testimony of PW-3 Ashwini - panch to the inquest panchnama would show that there was an impression on the neck of the deceased which led to the panchas to the conclusion that the death might have occurred due to throttling. PW-5 Dr. Manisha has clearly stated that there was fracture to thyroid cartilage and therefore, she has come to the conclusion that the cause of death was asphyxia due to throttling. The motive for commission of the crime has come on record through PW-1 Jitendra. Though the partition had taken place immediately after the death of father, yet accused was demanding partition from 8 to 9 acres of land which then stood in the name of deceased Tarabai. Informant PW-1 Jitendra was the best person to say that there were quarrels between accused and deceased as the informant is also residing in the same house. Probably when deceased refused the demand of partition by the accused, he has eliminated the mother. Considering the strong circumstances and medical evidence coupled with the evidence in respect of C.A. Report, the trial Judge had concluded that only the accused is the culprit. Therefore, there is no merit in the present Appeal and it deserves to be dismissed.

9. At the outset, it is to be noted that the case of the prosecution is based on

circumstantial evidence and therefore, the ration laid down in Kiran Ashok Jadhav vs. State of Maharashtra, (supra), Sharad Birdhichand Sarda vs. State of Maharashtra, (supra), Durgavati Ramparvesh Sharma vs. State of Maharashtra, (supra), Bodh Raj vs. State of Jammu and Kashmir, (supra), and State of Maharashtra vs. Ashok Hanmant Atkar, (supra), will have to be taken into consideration and it is required to be seen as to whether the evidence adduced by the prosecution fulfills the said criterias.

10. The testimony of PW-5 Dr. Manisha would show that she had found three external injuries, as referred above, on the dead body and also noted fracture of thyroid cartilage. On the internal examination also, she found the said fracture and therefore, it was opined that the cause of death was 'asphyxia due to throttling'. In her cross-examination, she has stated that there was no hemorrhagic patches over the lungs of the dead body. She was not able to say, if death is caused due to throttling such hemorrhagic patches have to be there over the lungs. She was confronted with the proposition from the Book of Medical Jurisprudence of Modi and then she agreed with the said proposition wherein it was mentioned that the lungs are usually markedly congested, showing hemorrhagic patches and petechiae and exuding dark fluid blood on section. She also agreed to the proposition laid down by Modi that in case of death by throttling or strangulation, there would be blood stained mucus and frothy mucus at bronchial tubes. She had not noted the same at the time of postmortem. She then admitted that the cause of death in the present case was cardio respiratory arrest due to asphyxia. She admits that she had not mentioned throttling as cause of death in the postmortem report, but voluntarily stated that asphyxia is result of throttling. She further agreed that asphyxia may result due to strangulation, suffocation, drowning and hanging also. She further admits that she had not found any ligature mark on the dead body. She has stated that if throttling is done for long time, ligature marks will occur. Ultimately, she has stated that it was her first case of postmortem of the case of asphyxia. She has not consulted anybody before giving the final cause of death. If we consider the postmortem report Exhibit-24, then it is only stated that death due to CRA due to Asphyxia due to, then some letters are scored out and then it is written as, unnatural cause. It also appears that unnecessarily short terms are used. For 'due to' it is written as 'dt' and what is scored is 'thro'. If the medical officer was firm about her finding that asphyxia was due to throttling, it ought to have been written so. Therefore, the testimony of the medical expert cannot be said to be of such a nature that it has proved the cause of death as throttling, beyond reasonable doubt. How the throttling would have been done, is still a mystery, because PW-5 Dr. Manisha does not say nor it was got confronted that the throttling was done with the help of scarf. As per the prosecution story, the scarf was used, but the medical evidence does not support that there was any ligature mark. We are, therefore, of the opinion that the prosecution had not proved that the death of Tarabai was homicidal in nature.

11. When it is not proved that the death is homicidal in nature, it should result in

acquittal of the accused who has been charged for murder. Though it has been stated in postmortem report Exhibit-24 that death is unnatural, it will not per se prove that it was homicidal in nature. Still if we consider the death of Tarabai to be homicidal, then it is required to be seen, as to whether the prosecution has brought on record sufficient evidence i.e. chain of circumstances which will unerringly point out towards the accused as the perpetrator of the crime.

12. PW-1 Jitendra, the informant, brother of the appellant was admittedly not present in the house at the relevant time. He had left the house in the morning and he claims that he has seen his brother i.e. appellant, mother Tarabai and grand-mother in the house when he left the home. In the present case, the spot of the incident / offence is not inside the house even as per the prosecution story. The prosecution has not come with the case that the accused had murdered the mother inside the house and then had thrown her dead body at the spot, which was about 50 ft. away from their house. What the brother i.e. PW-1 Jitendra has said that when he left home, at that time mother woke up but accused as well as grand-mother were still sleeping. This has come in his cross-examination. He has stated that he woke up at about 5.15 a.m. and his mother was already awoken. At that time the accused and grand-mother were sleeping. Till he left home, they both were sleeping. When he went out, his mother went towards the cattle shed. Thereafter, he says that around 9.27 a.m. he received phone call from his brother-in-law i.e. Pradeep Ithape stating that his mother i.e. Tarabai was not in the house. Pradeep told him that there was quarrel took place in the house and therefore, Jitendra should come urgently. Pradeep has not been examined by the prosecution to state as to how he got the information and from whom, that there was quarrel in the house. Further, in clear words PW-1 Jitendra has not stated that the quarrel was between whom and on what count. After PW-1 Jitendra returned home, he could not see mother. Accused was present but the grand-mother was crying. On what count the grand-mother was crying, because by that time the dead body was not found. Though Jitendra asked grand-mother, as to what has happened, she kept on crying. PW-1 Jitendra then called his driver PW-2 Avinash, his cousin brother Prakash Pathare and then they all started searching his mother. Important point to be noted here is that the grand-mother has also not been examined, who could have been the best witness because after PW-1 Jitendra left home, she was the only person in the house other than Tarabai and accused. For reasons best known to the prosecution, the grand-mother has been kept away from the witness box.

13. PW-1 Jitendra in his cross-examination, has clearly admitted that his grand-mother has told him that there was no quarrel between deceased and accused in her presence. Then the question arises, as to how Pradeep got the knowledge about the quarrel and had then allegedly transferred the said information to PW-1 Jitendra. The prosecution evidence, therefore, suffers from non-examination of important witnesses.

14. The testimony of PW-1 Jitendra would give an impression that, at some point

of time he was suspecting brother and at another breath he has stated that after watching the dead body of mother he suspected that some wild animal might have done the act. That means PW-1 Jitendra was not suspecting the brother. PW-5 Dr. Manisha is not ruling out the possibility of act by wild animal. PW-1 Jitendra admitted that wild animals used to come in their agricultural field. On this count also except suspicion there appears nothing as against the accused. PW-1 Jitendra admits that accused was whimsical and it appears that as the accused did not take part in searching mother and told that they should perform the last rites immediately without postmortem, the informant as well as PW-2 Avinash were saying that the accused has committed murder of his mother.

15. At this stage itself we would consider the testimony of PW-2 Avinash, who has taken part in search operation. He says that when they asked accused about the mother, accused did not say anything. As per the prosecution story, in his statement under Section 161 of the Code of Criminal Procedure, he has stated that the accused had given extra judicial confession in his presence. But in his substantive evidence, he has not stated anything about the alleged extra judicial confession. This witness has not been treated as hostile to that extent and questions in the nature of cross-examination have not been asked by the learned APP. Interestingly, even after name of Avinash was appearing in the FIR, PW-7 PSI Gore, the investigating officer has taken PW-2 Avinash as panch to the panchnama of seizure of clothes i.e. Exhibit-16 and 17. Panchnama Exhibit-16 and 17 and the statement of this witness under Section 161 of the Code of Criminal Procedure have been recorded on the same day. The investigating officer should have at least, shown regards to the procedure. A person who could be examined as a witness, may be supporting the incident for the role played by him, ought not to have been taken as a panch. These are the only two persons i.e. PW-1 Jitendra and PW-2 Avinash, to say anything regarding death and the circumstances in which Tarabai was found dead. The trial Court totally erred in not appreciating the evidence of these two witnesses with the back ground that they were not the proper witnesses on any point, much less on the point of 'last seen together'. Provisions of Section 106 of the Evidence Act could not have been invoked as, firstly, the incident has not taken place inside the house and secondly, informant had not seen deceased as well as accused together when he left the house.

16. PW-3 Ashwini Thorat is the panch to the inquest panchnama and nothing favourable has transpired in her evidence, but for mysterious reasons it has been stated that the panchas feel that death might have occurred due to throttling. In her substantial evidence, PW-3 Ashwini has not stated regarding the same. If we consider the description of the injuries noted, it was seen that there were scratch marks / abrasions over the entire face and blood has oozed from the right side of the nose because of the scratch. No doubt as regards the neck is concerned, it is stated that there was black stain on the neck. But as aforesaid, PW-5 Dr. Manisha has not stated that that the throttling was with scarf and as per her evidence, there was no ligature mark.

17. PW-4 Nitin Yadav is the Talathi, who acted as a panch to the spot panchnama. At the time of spot panchnama, three stones have been recovered, which were allegedly having blood stains. Its importance or connection has not been established by the prosecution.

18. PW-6 Police Constable Bharat Ingale is the carrier. Herein this case the spot panchnama was carried out on 15th August 2016 and the articles have been dispatched on 19th August 2016. The C.A. Reports Exhibit-27, 28 and 29 are not supporting the prosecution.

19. PW-7 PSI Gore has given the account of the investigation he has carried out. His evidence would definitely show that he was just acting as stated by PW-1 Jitendra, who was admittedly working in Police Department. It has come on record that the accused was in Military services and at the time of arrest he was not holding service revolver. Even on the point of motive, there is no proper investigation by the prosecution. The prosecution, especially, PW-1 Jitendra says that the accused was insisting that partition should be done in respect of 8 to 9 acres of land which was in the name of mother Tarabai. As aforesaid, except PW-1 Jitendra, nobody has been examined to support the said statement.

20. Taking into consideration the re-appreciation and revisiting to the evidence adduced by the prosecution, we are of the opinion that there was absolutely no evidence against the accused. The Judgment of the trial Court, based on wrong appreciation of the evidence is perverse and cannot be allowed to see the light even for a day. The Appeal deserves to be allowed. Accordingly, we pass following order:-

ORDER

(I) Criminal Appeal stands allowed.

(II) The conviction awarded to the appellant – Yuvraj Keshav Mandge in Sessions Case No.399 of 2016 by the learned Additional Sessions Judge, Ahmednagar on 2nd August 2017, for the offence punishable under Section 302 of the Indian Penal Code, stands quashed and set aside.

(III) The appellant stands acquitted of the offence punishable under Section 302 of the Indian Penal Code.

(IV) The appellant be set at liberty, if not required in any other case.

(V) The fine amount deposited, if any, be refunded to the appellant after the statutory period.

(VI) We clarify that there is no change as regards the order in respect of disposal of Muddemal passed by the learned Additional Sessions Judge, Ahmednagar.