(2008) 04 BOM CK 0141

Bombay High Court

Case No: Criminal Appeal No. 192 of 2006

Ramesh Govind Thakur	APPELLANT
Vs	
The State of Maharashtra	RESPONDENT

Date of Decision: April 3, 2008

Acts Referred:

- Evidence Act, 1872 - Section 26
- Penal Code, 1860 (IPC) - Section 302

Citation: (2008) CriLJ 2169

Hon'ble Judges: V.K. Tahilramani, J; F.I. Rebello, J

Bench: Division Bench

Advocate: Y.M. Choudhari, for the Appellant; V.R. Bhosale, Assistant Public Prosecutor, for the Respondent

Judgement

F.I. Rebello, J.

The Appellant herein was charged for the offence of murder of Hiravati @ Hiru Shankar Narkar by assaulting her with sickle and thereby committed an offence punishable u/s 302 of the Indian Penal Code. The charge was framed on 11th March, 2005. The learned Sessions Judge after examining the witnesses by his judgment dated 15th July, 2005 convicted the Appellant for the offence punishable u/s 302 of the I.P.C. and sentenced him to suffer imprisonment for life. It is this against this order that the Appellant is in Appeal before this Court.

2. On behalf of the Appellant his learned Advocate submits that there are no eye witnesses and the prosecution case is based entirely on circumstantial evidence. The prosecution it is submitted before the Sessions Court relied on the following incriminating circumstances:-Motive; Last seen; Seizure of blood stained underwear; Recovery of blood stained clothes belonging to V and of a blood stained sickle; Extra judicial confession and Injuries on the accused person. It is further submitted that the prosecution has not led any evidence of any witness to prove the motive. As so

far as the circumstances of last seen, according to the learned Counsel P.W. 6 has deposed that she saw the deceased on Monday (2-8-2004) at 6.00 p.m. in the house of the accused when both the Accused and his wife were present. According to the prosecution the incident occurred at 11.00 p.m. on 2nd August, 2004. The evidence on record does not prove the last seen theory or of incriminating the accused or advancing the prosecution case. In so far as seizure of blood stained underwear which was seized vide Panchanama Exhibit 15, the C.A. report shows that no blood or semen was found on the said underwear. Therefore, this cannot be considered as an incriminating circumstance against the accused. In so far as recovery of blood stained cloths it is submitted that the cloths were recovered on 9th August, 2004 as per the prosecution case on the statement of the accused. The evidence of P.W.5 would, however, show that the cloths and sickle were seen by her at the Police Station when the statement was recorded on 6th August, 2004. It is further submitted that no witness has identified these cloths in evidence before the Court as belonging to the deceased or the sickle as the one used for the offence. It is also pointed out that the seized articles were not sealed and on this ground also the evidence could not have been considered. In so far as extra judicial confession is concerned, it is submitted that in the evidence of P.W.8 the omission in his statement was put to him. Apart from that the purported extra judicial statement was made to P.W. 8l when the appellant was in the custody of the police at the police station. Considering Section 26 of the Indian Evidence Act the extra judicial confession would not be admissible. In so far as the injuries on the person of the accused is concerned, it is submitted that though it is contended that the accused was arrested on 7th August, 2004, he was already in the custody of the Police from 6th August, 2004. That has not been explained. In these circumstances that evidence also is of no consequence. At any rate it is submitted that the chain of circumstantial evidence which had to be established to prove that the involvement of the appellant had not been established and consequently the Appellant should be acquitted of the offence.

3. On behalf of the Respondent State, learned P.P. has sought to contend that there is no infirmity with the findings recorded by the learned Additional Sessions Judge and in these circumstances the conviction ought to be sustained.

4. At the outset we may point out that the law as settled is that all proved circumstances must form a chain of which no link must be missing and they must unequivocally lead to the guilt of the accused. We may refer to the law as decided. In Ashish Batham Vs. State of Madhya Pradesh, the Supreme Court once again reiterated the law and referred to the judgment in Hanumant Vs. The State of Madhya Pradesh, where the Court observed as under:

In dealing with the substantial evidence the rules specially applicable to such evidence must be borne in mind in such cases there is always the danger that conjecture or suspicion may take the place of legal proof and therefore, it is right to

recall the warning addressed by Baron Alderson to the jury in Reg. v. Hodge (1838) 2 Lewin 227 where he said:

The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little. If need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting to take for granted some fact consistent with its previous theories and necessary to render them complete.

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

5. We have heard the learned Counsel for the Appellant as also the learned Public Prosecutor. In so far as motive is concerned, though the prosecution examined 13 witnesses no evidence on that aspect has come on record. The prosecution has been unable to establish the motive. On the contrary it has come on record that the deceased was known to the Appellant and his wife. P.W. 6 in fact states on the day of the incident she had seen the deceased sleeping in the house of the appellant at about 6.00 p.m. This would show that the Appellant and his family were on friendly terms with the deceased. Nothing contrary has been brought on record to show any motive. Motive has not been established. Motive may not be relevant in a case where the evidence is overwhelming, but it is a plus point for the accused in cases where the evidence is only circumstantial. See Sakharam Vs. State of Madhya Pradesh, . The prosecution in this case has not been able to establish any motive.

6. We next come to the issue of circumstances of last seen. The evidence on record is of P.W.6 Bhagirathi Vishnu Kokare, who had deposed that she had seen the deceased sleeping in the house of the Appellant at 6.00 p.m. and the appellant and his wife both were present at the house. The prosecution case is that the incident had happened on 2nd August, 2004 at 11.00 p.m. In terms of the evidence of the Doctor who did the Post-mortem P.W. 7 it is in his evidence that the deceased must have died more than 24 hours before the P.M. The P.M. was conducted between 4 to 6 p.m. on 4th August, 2004. The death, therefore, could have occurred any time previous to 4.00 p.m. of 3rd August, 2004. Therefore, between the appellant being seen with the deceased at 6.00 p.m. on 2nd August, 2004 and 4.00 p.m. on 3rd August, 2004 there is a gap of 44 hours. It is true that in the evidence of P.W. 5 Sharmila Shankar Bodekar it has come on record that at 12.00 p.m. that day the

accused came to her house on bicycle and demanded liquor which she refused. There is no explanation coming from the prosecution about the deceased's whereabouts after 6.00 p.m. till the complaint filed by P.W. 1 Kamalakant Krishna Kamat who was informed on 3rd August, 2004 that one dead body was lying near the electric pole. He has also deposed that the face was practically smashed. The body was naked and the hairs were missing. As explained earlier on that very night the appellant had been to the house of P.W.5 after midnight.

7. In so far as seizure of blood stained underwear of the Accused is concerned though it was seized under a Panchanama. The article was at item No.5 of the report of the C.A. The result shows that there was no blood detected on Exh.5 and similarly no semen was detected on exhibits 5, 7, 8 and 9. The purported recovery of the underwear of the appellant is, therefore, of no consequence.

8. The next circumstance is recovery of blood stained cloths belonging to the deceased and the blood stained sickle. The first infirmity in this seizure is that neither the Panchanama Exh.17 nor Panch P.W. 3 have stated that the articles were sealed upon seizure or any time soon thereafter. The I.O. in his evidence has admitted that he did not seal the articles after recovery. In the matter of circumstantial evidence failure to seal the articles must be viewed with suspicion. Reliance if at all if required can be placed on the judgment of the Supreme Court in Sahib Singh Vs. State of Punjab, and in Salim Akhtar alias Mota v. State of Utter Pradesh 2003 All M.R. (Cri.) 1167. The second aspect of the matter is that the recovery was effected on 9th August, 2004. P.W. 5 Sharmila, however, deposed that she had identified the articles belonging to the accused which were shown by her to the police at the time of recovery of her second statement including sickle. In other words the evidence of this witness will show that the articles were already in possession of the Police on 6th August, 2004 on which day her second statement was recorded. The recovery, therefore, effected on 9th August, 2004 at the purported instance of the Appellant will have to be rejected. The third aspect of the matter is that the identity of the clothes as belonging to the deceased was not established through any witness before the Court. This is one more circumstances for rejecting the purported recovery.

9. Lastly on behalf of the Appellant learned Counsel pointed out that the Panch who was present when the Panchanama was drawn was staying 24 Kms. away from the Police Station at different village. No explanation has been given as to why a person was called to act as a Panch staying 24 Kms. away. In our opinion it is not necessary to consider this aspect considering our finding that the recovery has to be rejected.

10. The other major circumstantial evidence is the extra judicial confession purported to have been made by the Appellant to the P.W. 8. P.W. 8 Jagdish Jaywant Kadam in his evidence has deposed that the Appellant was working as a servant for him and that he had confessed to the killing of the deceased. In the cross examination it was put to him that in the statement recorded, this was not so

recorded. His only answer was that he cannot assign any reason why it is not appearing in the statement. If such a statement had been made in our opinion as an extra judicial confession it would have found a place in the statement recorded by the Police. Apart from that we have to consider Section 26 of the Indian Evidence Act, which sets out that no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. Admittedly on that day as per the evidence of P.W. 8 himself he visited the appellant when in police custody and met him with the permission of P.I. Bhosale. Considering the mandate of Section 26 in our opinion this evidence also will have to be rejected.

11. In our opinion as from the evidence it is clear that the prosecution has been unable to prove motive, or establish the last seen theory, or prove the recovery of the sickle and clothes of the deceased and the purported extra judicial confessional statement of the appellant. In our opinion it is not necessary to consider the various other contentions raised on behalf of the appellant by the learned Counsel. The prosecution has not been able to show any evidence linking the guilt of the appellant to the accused. In our opinion, therefore, the Appeal will have to be allowed.

12. In the light of that the conviction of the Appellant u/s 302 of the I.P.C. is set aside. The Appellant is directed to be released forthwith, if he is otherwise not required in any other offence.

13. Muddemal articles to be disposed of according to law.