



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 549 OF 2016

Rajeshwar Marotrao Biradar,
Age 35 years, Occu. Agri.,
R/o. Bellur, Tq. Degloor,
District Nanded.

... Appellant

Versus

The State of Maharashtra

... Respondent

...

Mr. Satej S. Jadhav, Advocate for the Appellant.

Mr. R. D. Sanap, APP for the Respondent-State.

...

**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATE : 09.06.2023.

JUDGMENT (PER ABHAY S. WAGHWASE, J.) :

1. Appellant, a convict for offence under Section 302 of the Indian Penal Code [IPC], is hereby challenging the judgment and order dated 10.08.2016 passed in Sessions Case No. 24 of 2014 by learned Additional Sessions Judge, Biloli, by which he was held guilty for the charge under Section 302 IPC and accordingly sentenced to imprisonment for life.

FACTS GIVING RISE TO SESSION TRIAL

2. Degloor Police Station, District Nanded chargesheeted accused on accusation that deceased Ujwala, who was wife of accused, was initially shifted to Dhanvantari Hospital, Degloor and then to Godavari Hospital, Nanded on 18.08.2011 in the early hours of morning on the complaint of convulsions, giving history as fall from bed/cot. While undergoing treatment, she died. Initially Accidental Death was registered bearing A.D. No. 29/2011. On receipt of medical opinion, more particularly autopsy doctor's opinion, it was revealed that death was due to smothering and manual strangulation. On receipt of such opinion, the police officer himself registered crime and on the strength of the same, investigation was carried out after arresting the accused. After completion of investigation, he was duly chargesheeted and was tried by learned Additional Sessions Judge, Biloli vide Sessions Case No. 24 of 2014.

3. At trial, prosecution adduced oral evidence i.e. of in all 9 witnesses and sought reliance on documentary evidence like A.D. papers, medical papers, panchanamas, postmortem report etc.

4. After hearing both sides and on appreciating the evidence, learned trial Judge reached to a finding that accused is responsible for the death of Ujwala. That, it is homicidal death and accused being in the company of deceased, by invoking Section 106 of the Indian Evidence Act, he is held responsible for her death and thereby convicted and sentenced as above.

SUBMISSIONS

On behalf of the Appellant:

5. The sum and substance of arguments advanced before us by learned counsel for the appellant is that, the impugned judgment and order of conviction is patently illegal, perverse and not sustainable in the eyes of law. He pointed out that firstly, there is no direct eye witness and entire case of prosecution is based on circumstantial evidence. It is his submission that in such factual background, it was incumbent upon the prosecution to first establish death of Ujwala to be nothing but homicidal. He would submit that medical evidence adduced by investigating machinery is not clear and cogent about mode of death. He pointed out that confusing opinions are issued by various doctors. According to him, medical experts themselves were baffled and clueless as there is no cause of death. During treatment also there were no findings suggesting physical assault. He would strenuously submit that the FIR is lodged only on the strength of medical opinion which too was received after two years or so, after conducting postmortem and thus it is his submission that the case of prosecution ought not to have been accepted by learned trial Judge. He pointed out that case being based on circumstantial evidence, it was duty of the prosecution, at the outset, to prove motive behind the alleged occurrence. It is submitted that there is no iota of evidence regarding motive and learned trial Judge has given finding to that extent on the basis of conjectures and surmises. He pointed out that it seems from the judgment that

learned trial judge has held accused guilty by applying Section 106 of the Indian Evidence Act to hold that accused was the only person in the company of deceased and she having died, he is solely responsible. Finding fault with such conclusion, it is submitted that it was not open for the learned trial Judge to opine as above, when in fact, primary burden of establishing homicidal death was not discharged by the prosecution. Thus, learned counsel submits that such findings are not sustainable.

6. He further submitted that in fact deceased was sleeping in the night on the cot. Accused was out of the room as he woke up earlier to her and when he came back, he found that she had fallen from the bed and was convulsing. That, there was history of epilepsy. She was immediately shifted to hospital for treatment. There are medical papers to that extent and so, he submitted that, accused had found his wife having a sudden accidental fall and therefore he promptly took steps to provide her medical aid. He submitted that such conduct of the appellant has not been taken into account by the learned trial Judge and rather, in absence of any material and foundation, guilt is fasten for murder of wife. Lastly it is submitted that evidence on behalf of prosecution is weak and none of the circumstances put forth by prosecution were firmly and cogently established. Therefore, he concluded that the judgment under challenge being invalid and perverse in the eyes of law, is liable to be set aside by allowing the appeal.

On behalf of the State:

7. Per contra, learned APP canvassed in favour of the judgment passed by learned trial Judge. He submitted that accused was the only person in the company of his wife. She was in his custody. She had met unnatural death. Therefore, accused was expected to offer plausible explanation for the unnatural death of his wife while she was in his custody and therefore, unerringly finger of accusation is rightly raised against him by the investigating machinery and accused having failed to discharge the burden as to how his wife met death while she was with him in a room, conviction arrived at by learned trial Judge cannot be faulted at. Consequently, he prayed to dismiss the appeal.

8. We are called upon to exercise powers under Section 374 of the Code of Criminal Procedure [Cr.P.C.] and being first appellate court and a last fact finding court, in view of the law laid down by the Apex court in the case of *Ishvarbhai Fujibhai Patni v. State of Gujarat* ; (1995) 1 SCC (Cri.) 222 and *Geeta Devi v. State of UP and others* ; 2022 SCC OnLine SC 57, we are expected to re-appreciate, re-examine and re-analyze the entire evidence adduced before the learned trial Judge.

9. There is no dispute that in this case there is no direct evidence and therefore case being based on circumstantial evidence, in view of the settled

law in the cases of *Hanumant Govind Nirgudkar and another v. State of M.P.*, AIR 1952 SC 343 followed by water shedding judgments in the case of *Shivaji Sahebrao Bobade v. State of Maharashtra*, AIR 1973 SC 2622; *Sharad B. Sarda v. State of Maharashtra*, AIR 1984 SC 1622; *Padala Veera Reddy v. State of Andhra Pradesh*, 1989 (Suppl.2) SCC 706; *Dhananjay Chaterjee @ Dhana v. State of West Bengal*, 1994 SCC (2) 220 and *State (NCT of Delhi) v. Navjyot Sandhu @ Afsan Guru*, 2005 (11) SCC 600, the principles culled out in these landmark cases are required to be applied to test whether circumstances relied by the prosecution are cogently and firmly established and whether a chain of circumstances is complete and unbroken.

10. It transpires from the papers before the trial court that as many as nine witnesses were examined. Their status and role could be summarized as under:

PW1 Waman Bandewar - the PSI posted at Degloor Police Station carried out A.D. inquiry, conducted inquest and drew spot panchanama.

PW2 Bandopant Pandve - a pancha to spot panchanama, has not supported the prosecution.

PW3 Dr. Sanjay Ladke - medical officer of the hospital, namely, 'Dhanvantari' where deceased was shifted. He examined deceased and referred her to Civil Hospital, Degloor.

- PW4** Hanuman Parande - is the police officer who lodged FIR on behalf of the State on receipt of opinion from the autopsy doctor.
- PW5** Dilip Firange - is the auto rickshaw driver in whose auto rickshaw deceased was shifted to hospital.
- PW6** Hanmantrao Achegave - pancha to the panchanama of house of accused and deceased.
- PW7** Dr. Sheshrao Gaikwad – the doctor working at Godavari Hospital where deceased was treated from 18.08.2011 to 23.08.2011.
- PW8** Dr. Maroti Dake - is one of the autopsy doctors who carried postmortem on the dead body of Ujwala on 23.08.2011 and on receipt of CA report, issued opinion about cause of death.
- PW9** Dharmraj Ombase - a police officer who concluded his investigation and chargesheeted accused.

Apart from above oral account, prosecution has relied on various documents including medical papers, panchanamas etc.

11. Here, in view of charge under Section 302 of IPC, it has to be seen whether, at the outset, prosecution has established death of Ujwala to be homicidal one as the very mode of death is questioned by the appellant herein. For this purpose, we need to visit medico legal expert's evidence. It is emerging that deceased was shifted to Godavari Hospital on 18.08.2011 and was treated there till 23.08.2011. **PW7-Dr. Gaikwad** who treated deceased is

examined at Exhibit 23. In his substantive evidence he stated that lady was brought in unconscious state from Government Hospital, Nanded i.e. on reference by Doctors of Dhanvantari Hospital i.e. by PW3-Dr. Ladke. Treating doctor **PW7-Dr. Gaikwad** spoke about history of fall from bed being given and about patient suffering convulsions since then. This witness stated that on clinical examination, there were signs of abrasion over neck on anterior side and over right ear pinna. According him, there being no proper history, he issued MLC informing police **raising suspicion about poisoning**. He further stated that patient was shifted to ventilator support. There was no other injury either on head or any other part of the body. According to him, on 23.08.2011 condition of the patient deteriorated and at around 1.20 p.m. she suffered cardiac arrest and in spite of taking efforts to revive, patient did not respond and was resultantly declared dead around 2.00 p.m. and body was referred for autopsy. To a court question as to whether, as expressed by the doctor, there are two possibilities i.e. one of poisoning and second of strangulation; whether both poisoning and strangulation were present, the witness has answered that both cannot be present at the same time.

12. In cross-examination at the hands of defence, above doctor has initially denied that for concluding death by strangulation, structure of the neck is required to be referred to pathology department. However, he has admitted that in case of poisoning it is necessary to sent contents of stomach, intestine

and liver for histopathology examination. He candidly admitted that after examination, no conclusion could be drawn about specific cause of death. Medical papers are also identified by this witness.

13. Now let us carefully sift the evidence of autopsy doctor PW8-Dr. Maroti Dake at Exhibit 27. According to him, on 23.08.2011 he along with Doctor Zanjad and Dr. Bhosle, conducted autopsy in the evening at around 6.30 p.m. to 7.00 p.m. He described as many as 13 external injuries which were noted in his substantive evidence. On internal examination he came across eight injuries which he narrated in his substantive evidence.

This witness stated that after conducting PM, following findings were noticed.

1. Multiple healed abrasions on the neck.
2. Echymosis and petechial hemorrhages on both lungs.
3. Cerebro pulmonary oedema.

Viscera was preserved for CA report and histopathology report and final opinion was reserved for want of report on the same.

He further states that on the basis of CA report, histopathology report and indoor papers of Godavari hospital, final opinion was issued as cause of death to be “asphyxia due to smothering with manual strangulation”. He stated that **final opinion was given on 31.10.2013.**

14. Autopsy doctor was subjected to extensive cross wherein he has denied that as they were not sure about cause of death, papers of Godavari hospital were called. He admitted that CT brain report was normal. He answered that x-ray report issued by Godavari hospital dated 18.11.2011 revealed **suspicion about pneumonitis**. He denied that if a patient with a history of epilepsy is wearing ornaments, injury nos. 1 to 12 are possible. According to him, it is not necessary that, to find out manual strangulation, structure of neck has to be referred to histopathology. He admitted that hyoid bone, thyroid fracture and laryngeal were found intact. Rest is all denial.

15. If we minutely analyze the above discussed evidence of PW8 Dr. Dake-autopsy doctor, it is emerging that autopsy was conducted on 23.08.2011. After postmortem, no opinion about final cause of death was issued and viscera was preserved and opinion was reserved for want of report of CA. Record shows that CA report is issued 08.04.2013 which was said to be dispatched on 23.08.2011, whereas final opinion of cause of death is issued on 31.10.2013 i.e. after almost two years after postmortem. Opinion issued is about probability of cause of death to be smothering with manual strangulation.

16. In the light of above opinion, it needs to be considered that here, according to medico legal experts, there is both smothering as well as manual strangulation. Admittedly, there is only one accused facing trial for homicidal

death. Autopsy doctor has not elaborated whether smothering could have been done first or manual strangulation. It is impossible for a single person to smother as well as strangulate other full grown person at one and the same time, unless the deceased is rendered incapacitated by any mode. Here, there is no evidence of any ligature mark on the neck of deceased. When autopsy evidence does not point out the internal impact of manual strangulation, said opinion cannot be accepted straightaway. It is expected of the autopsy doctor to elaborate and justify the findings and conclusion arrived at, which is precisely not done in the case in hand. Unfortunately, there is no detail cross by defence counsel while cross examining above witness. It is pertinent to note that another and previous doctor at Godavari Hospital has candidly admitted that there were no injuries on the head or other parts of the body while deceased was treated from 18.08.2011 to 23.08.2011. He also admitted that in case of manual strangulation, there has to be pathological changes. He admitted that CT scan report is normal and there were no signs of hemotoma on the skull. On the contrary, death is attributed due to cardiac arrest at 1.20 p.m. on 23.08.2011.

17. It seems that autopsy doctor's opinion has prevailed over the learned trial Judge for accepting the case of prosecution about death of Ujwala to be homicidal one. It is settled law that medico legal expert's evidence is mere opinion evidence. But the opinion would not have a binding effect if it is not

supported by sound reasons and is convincing one. The court is expected to analyze the report and is also expected to re-read in conjunction with other evidence on record and thereafter draw inference. It being mere opinion evidence, is required to be tested in the light of circumstances of each case and the evidence on record. Here, as stated above, there are two distinct opinions and contrary finding about injuries on the person of deceased i.e. by PW7 and PW8. In spite of PM being done on 23.08.2011, pertinently opinion about final cause of death is issued after almost two years. It is also worth noting that autopsy doctor has tried to relate death dated 23.08.2011 to the incident alleged to have occurred on 18.08.2011. It needs to be noted that under such circumstances, when opinion was about smothering with strangulation on 18.08.2011, the crucial question arises is, how could victim survive till 23.08.2011? Admittedly, she was not treated at any of the two hospitals and there are no notings on papers regarding typical signs of smothering or strangulation. There is a gap of seven days since occurrence till deceased died and there is no explanation for said seven days. Therefore, in our opinion, medical evidence is not free from doubt and is shrouded with various unexplained circumstances. Therefore, with such quality of medical evidence on record, learned trial Judge ought not to have straightaway accepted the medical evidence to hold case of prosecution as proved.

18. On taking survey of the entire evidence of prosecution, it is seen that motive behind the incident is also not proved by the prosecution. There is not a single piece of evidence suggesting any ill motive attributable to the accused. Neither relatives of deceased Ujwala nor any acquaintances or neighbours are examined by the investigating machinery. Even the Investigating Officer is not examined by prosecution for the best reasons known to them.

19. We have examined and carefully taken into account the findings and reasons arrived at by the learned trial Judge. In view of above discussion, here, there is no clear, cogent, concrete or trustworthy evidence to connect accused. Circumstances are not unerringly pointing to the guilt of accused. Provision under Section 106 of the Evidence Act and the settled legal position for invoking said provision has not been considered by learned trial Judge. Apparently motive is also drawn on pure conjectures and surmises. Learned trial Judge has not considered that the case involved charge of murder and it being serious offence, standard of proof and quality of evidence was required to be of higher caliber. None of the circumstances relied by prosecution were in fact firmly and cogently proved. Consequently, the impugned judgment being unsustainable in law, cannot be allowed to be sustained. Hence, we proceed to pass the following order:

ORDER

1. Criminal Appeal stands allowed.

2. The Judgment and conviction awarded to the appellant Rajeshwar Marotrao Biradar in Sessions Case No.24/2014 on 10.08.2016 after holding him guilty for committing an offence punishable under Section 302 of the Indian Penal Code by learned Additional Sessions Judge, Biloli, Dist. Nanded stands quashed and set aside.
3. The appellant be set at liberty, if not required in any other case.
4. It is clarified that there is no change in the order of disposal of muddemal.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

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