

Vandana Vs. The State of Maharashtra

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Court : Mumbai Nagpur

Decided On : Feb-05-2015

Judge : A.B. Chaudhari & P.N. Deshmukh

Appeal No. : Criminal Appeal No. 508 of 2012

Appellant : Vandana

Respondent : The State of Maharashtra

Advocate for Pet/Ap. : Shri. R.M.Daga

Judgement :

Oral Judgment: (P.N. Deshmukh, J.)

1. This appeal takes exception to the judgment dated 8th of October, 2012 passed by learned Sessions Judge, Chandapur in Sessions case No.124 of 2011, by which appellant/accused came to be convicted for the offence punishable under Section 302 of the Indian Penal Code and is sentenced to suffer life imprisonment and to pay a fine of Rs.5000/-, in default to suffer rigorous imprisonment for six months.

2. Briefly, it is the case of prosecution that accused/appellant Vandana committed murder of her husband Yogesh Mankar on 7th of July, 2011 at 6.30 p.m. in their house. Said fact was informed telephonically to PW 2 Ramesh Mankar, brother of deceased, the complainant who visited the spot and found deceased lying in the

pool of blood while appellant was present in the house sitting in the kitchen door. On enquiry, appellant stated to PW 2 Ramesh that her husband used to suspect on her character and thus used to raise quarrels and beat her and for that reason she is alleged to have confessed that on the fateful material night when deceased was in his deep sleep appellant assaulted on his head by an axe causing his death.

On the basis of report lodged by PW 2 Ramesh, offence was registered vide crime No.199 of 2011 and investigated by PW 4, Radheshyam Pal, PSI, Ram Nagar Police Station. During the course of investigation, said Officer visited the spot, drew spot panchanama and seized axe and other articles like blood stained quilt, nylon mat, one pillow, piece of floor stained with blood and piece of floor without blood, drew inquest panchanama and forwarded the dead body for its Post Mortem and on recording statements of witnesses effected arrest of appellant and seized her clothes. Seized Muddemal articles along with axe was sent for its analysis to Chemical Analyzer. On receipt of Chemical Analyzer report, Post Mortem report and on completion of investigation, chargesheet came to be filed before the Judicial Magistrate (F.C.), Chandrapur. In the course of time, case came to be committed for trial before the Court of sessions.

3. Charge was framed against the appellant for the offence punishable under Section 302 of the Indian Penal Code to which she pleaded not guilty and claimed to be tried. Defence of appellant is of total denial.

4. Having considering the evidence on record, the learned Sessions Judge convicted the appellant as aforesaid. Hence, this appeal.

5. Heard Shri R.M.Daga, learned counsel for the appellant and Shri V.A.Thakre, learned Additional Public Prosecutor for the State.

6. To effectively evaluate the submissions advanced by learned Advocates for both the sides, with their assistance, we have scrutinized the evidence on record.

7. Admittedly, case of prosecution is based on evidence of sole eye witness of PW 1 Isha who is daughter of appellant and of deceased and on extra judicial

confession made by appellant to PW 2 Ramesh. In that view of the matter, we have scrutinized the evidence of PW 1 Isha, aged 8 years, who has stated that at the time of incident she was staying with her parents and one Shri Lonare used to come to meet appellant and they used to talk due to which deceased used to indulge into quarrel with the appellant. She further stated that incident took place at 6.00 a.m. when she along with her parents and younger sister Nikita were sleeping in the house. She stated that she woke up from her sleep on hearing shouts of appellant and found her to have kept her leg on the back of deceased and was assaulting him by means of an axe on his head and after the assault kept axe besides the mat upon which deceased was lying on the ground.

8. PW 1 Isha further stated that while she was weeping one muslim person came to their house and asked appellant as to why she had assaulted deceased by axe to whom appellant informed that deceased used to quarrel with her. She further stated that on telephonic information given by one Raju Ramteke her uncle PW 2 Ramesh arrived in their house and on touching the body of deceased found that he was dead. Thereafter police arrived and took appellant with them.

9. On minutely considering above evidence, we find it is necessary to note that admittedly prosecution has not examined Nikita, younger sister of PW 1 Isha who, according to her, was in fact present in the same room where incident took place and was sleeping with her. It is further material to note that no investigation is carried out with reference to any muslim person referred by PW 1 Isha who had immediately visited the spot after the incident though it is the case of prosecution that on his enquiring with appellant about the assault on the head of deceased she gave reason of quarrel, as aforesaid. Similarly, prosecution has also not examined Raju Ramteke who according to PW 1 Isha had made a telephone call to PW 2 Ramesh who accordingly reached the house of appellant. No reason is put forth by prosecution for non-examination of Nikita, muslim person as well as Raju Ramteke though all these witnesses appear to be very much material, as Nikita was present in the room at the time of incident while one Muslim person appears to have visited the house of appellant immediately after the incident and also claims that appellant had confessed before him. So also, though it has come in the evidence of PW 1 Isha that Raju Ramteke had made phone call to PW 2 Ramesh

for non examination of said witness, there is nothing to establish as to on what basis Raju Ramteke received information and thus made phone call to PW 2 Ramesh. In the background of above evidence, before adverting to the cross-examination of PW 1 Isha, we find it necessary to refer to the evidence of PW 2 Ramesh. 10. PW 2 Ramesh has stated that on the day of incident at 6.30 a.m. while he was in the house he received phone call from one person by name Raju at 7.30 to 7.45 a.m. who has informed that his sister-in-law had killed his brother by assaulting on his head by an axe and therefore he visited the spot immediately. Considering this piece of evidence we further find it necessary to note that there is nothing on record established by prosecution as to under what circumstances Raju Ramteke had knowledge of incident as according to evidence of PW 2 Ramesh, PW 2 Raju Ramteke had given details of assault by appellant on deceased Yogesh by an axe on his head. In spite of that said Raju Ramteke is not examined nor prosecution has unfolded its case on this aspect. Rest of the evidence of PW 2 Ramesh is with reference to extra judicial confession of appellant with which we dealt a little later on considering cross-examination of PW 1 Isha.

11. Coming back to the evidence of PW 1 Isha, she has stated that she has elder sister Shivani and two younger sisters namely Apeksha and Nikita out of which Nikita was in the room at the material time sleeping with her and according to her, she used to sleep with Nikita on the bed while deceased and appellant used to sleep on floor on mat. In view of her evidence, on perusal of spot panchanama it reveals that the incident took place in a small room admeasuring 10 x 10 ft. One cot is shown in the room in its corner while the spot where deceased is shown in the same room is adjoining on the cot. Considering the small size of room and the nature of assault as set out by prosecution, it was expected on the part of the prosecution to examine younger sister of PW 1 Isha; namely Nikita, as according to her she was also present in the room at the material time. For non-examination of said material witness we find it unsafe to rely upon sole testimony of PW 1 Isha more particularly when in the cross-examination she has specifically admitted that when she got up from sleep she found her father to be dead. In the light of her admission of not seeing the assault, as aforesaid, and in the absence of any other corroborative evidence, we find unsafe to rely upon sole evidence of PW 1 Isha. Even otherwise she appears to have materially improved her version when she

claims to have stated in her statement before police that one muslim person asked appellant as to why she beat deceased by means of axe and has further claimed to have stated to police that appellant told him that deceased used to quarrel with her. She also claims to have stated to police that Raju Ramteke made phone call to PW 2 Ramesh and also that one Mr. Lonare used to come to their house and used to talk with the appellant. However, she cannot assign any reason why said facts are not mentioned in her statement. Above omissions in the evidence of PW 1 Isha are duly got proved by prosecution from the evidence of PW 4 Radheshyam, Investigating Officer.

12. In the background of evidence of Isha, sole eye witness relied in this case by prosecution, we find it useful to refer to the decision in the case of **ShivajiShabrao Bobade and anr. ..vs.. State of Mah**, reported in **(1973)2 SCC 793** wherein testimony of single eye witness was relied as he was found to be truthful. However, it is noted that since said witness was interested witness, such evidence was accepted as it was corroborated by other evidence which was available in that case. However, in the case in hand except for sole testimony of PW 1 Isha there is absolutely no corroboration to her evidence which in view of above law is necessary since she is admittedly an interested witness.

13. In view of above discussed evidence and for want of sufficient corroborative evidence, we are not inclined to believe evidence of PW Isha.

14. PW 2 Ramesh, the complainant, has stated that on his arrival in the house of appellant, he made enquiry with her about the assault upon which she told that in anger she killed deceased by means of an axe. In view of this piece of evidence of extra judicial confession of appellant, as aforesaid relied by prosecution, we further find it useful to refer to the decision of the Apex Court in the case of **Sahadevan and another ..vs.. State of Tamil Nadu**, reported in **(2012) (Cri) 146** wherein Apex Court had an occasion to consider the issue regarding extrajudicial confession. It will be relevant to refer to paragraph nos.15 and 16 of the aforesaid judgment.

15. Now, we may examine some judgments of this Court dealing with this aspect.

15.1 In *Balwinder Singh v. State of Punjab* [1995 Supp. (4) SCC 259], this Court stated the principle that an extra-judicial confession, by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extrajudicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance.

15.2. In *Pakkirisamy v. State of T.N.* [(1997)8 SCC 158], the Court held that it is well settled that it is a rule of caution where the court would generally look for an independent reliable corroboration before placing any reliance upon such extra-judicial confession.

15.3. Again in *Kavita v. State of T.N.* [(1998)6 SCC 108], the Court stated the dictum that there is no doubt that convictions can be based on extra-judicial confession, but it is well settled that in the very nature of things, it is a weak piece of evidence. It is to be proved just like any other fact and the value thereof depends upon veracity of the witnesses to whom it is made.

15.4. While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extra-judicial confession, this Court in the case of *State of Rajasthan v. Raja Ram* [(2003)8 SCC 180] stated the principle that an extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made.

The Court further expressed the view that : such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused.

15.5. In the case of *Aloke Nath Dutta v. State of W.B.* [(2007) 12 SCC 230], the Court, while holding the placing of reliance on extrajudicial confession by the lower courts in absence of other corroborating material, as unjustified, observed:

87. Confession ordinarily is admissible in evidence. It is a relevant fact. It can be acted upon. Confession may under certain circumstances and subject to law laid down by the superior judiciary from time to time form the basis for conviction. It is, however, trite that for the said purpose the court has to satisfy itself in regard to:

(i) voluntariness of the confession; (ii) truthfulness of the confession; and (iii) corroboration.

89. A detailed confession which would otherwise be within the special knowledge of the accused may itself be not sufficient to raise a presumption that confession is a truthful one. Main features of a confession are required to be verified. If it is not done, no conviction can be based only on the sole basis thereof.

15.6. Accepting the admissibility of the extra-judicial confession, the Court in the case of *Sansar Chand v. State of Rajasthan* [(2010) 10 SCC 604] held that:

29. There is no absolute rule that an extra judicial confession can never be the basis of a conviction, although ordinarily an extrajudicial confession should be corroborated by some other material [Vide *Thimma and Thimma Raju v. State of Mysore*, *Mulk Raj v. State of U.P.*, *Sivakumar v. State* (SCC paras 40 and 41 : AIR Paras 41 and 42), *Shiva Karam Payaswami Tewari v. State of Maharashtra* and *Mohd. Azad v. State of W.B.*]

30. In the present case, the extrajudicial confession by Balwan has been referred to in the judgments of the learned Magistrate and the Special Judge, and it has been corroborated by the other material on record. We are satisfied that the confession was voluntary and was not the result of inducement, treat or promise as contemplated by Section 24 of the Evidence Act, 1872.

15.7. Dealing with the situation of retraction from the extra-judicial confession made by an accused, the Court in the case of *Rameshbhai Chandubhai Rathod v. State of Gujarat* [(2009) 5 SCC 740], held as under:

53. It appears, therefore, that the appellant has retracted his confession. When an extrajudicial confession is retracted by an accused, there is no inflexible rule that the court must invariably accept the retraction. But at the same time it is unsafe for

the court to rely on the retracted confession, unless, the court on a consideration of the entire evidence comes to a definite conclusion that the retracted confession is true.

15.8. Extra-judicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witnesses must be clear, unambiguous and should clearly convey that the accused is the perpetrator of the crime. The extra-judicial confession can be accepted and can be the basis of conviction, if it passes the test of credibility. The extra-judicial confession should inspire confidence and the court should find out whether there are other cogent circumstances on record to support it. [Ref. Sk. Yusuf v. State of W.B. [(2011) 11 SCC 754] and Pancho v. State of Haryana [(2011) 10 SCC 165].

The Principles :

16. Upon a proper analysis of the above-referred judgments of this Court, it will be appropriate to state the principles which would make an extra-judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused.

(i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with grater care and caution.

(ii) It should be made voluntarily and should be truthful.

(iii) It should inspire confidence.

(iv) An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

(v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

(vi) Such statement essentially has to be proved like any other fact and in accordance with law.

15. It can thus clearly be seen that after considering the law on the question, the Apex Court has in unequivocal terms held that the extra-judicial confession is a weak piece of evidence by itself and it has to be examined by the court with greater care and caution. It should be made voluntarily and should be truthful. It has been further held that it should inspire confidence. The apex court has further held that an extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence. The apex court further held that if the basis of conviction is an extra-judicial confession then it should not suffer from any material discrepancies and inherent improbabilities.

16. In the light of above principles when the extra judicial confession relied by the prosecution in the present case is considered, we find it unsafe to rely upon the same in view of the fact that evidence of PW 1 Isha is totally silent on this aspect, as she has nowhere stated that after arrival of PW 2 Ramesh he had any conversation with appellant, as according to her evidence after arrival of PW 2 Ramesh in the house he touched the body of deceased and found him dead and nothing more. In that view of the matter, prosecution case on this limb also fails.

17. Learned Additional Public Prosecutor Shri Thakre during the course of argument has also contended that since incident took place in the house occupied by the appellant and deceased, burden lies upon the appellant to explain as to the cause of death of deceased in view of Section 106 of the Indian Evidence Act, 1872. However, we are not inclined to accept said submission having considering the fact that the burden of proving the fact especially within the knowledge can be shifted upon the appellant only upon prosecution establishing its case against the appellant beyond reasonable doubt. Section 106 of the Indian Evidence Act does not relieve the prosecution to prove its case beyond reasonable doubt. Only when the prosecution case has been proved, the burden in regard to such fact which was within the special knowledge of the accused may be shifted to the accused for explaining the same subject to certain statutory exceptions. In that view of the

matter, we reiterate that in criminal cases it is for the prosecution to prove the involvement of the accused beyond reasonable doubt before taking recourse to Section 106 of the Indian Evidence Act.

18. Learned Additional Public Prosecutor by referring to the statement of appellant recorded under Section 313 of the Code of Criminal Procedure has further pointed out that as per the written statement, appellant had admitted her guilt and as such her involvement in the Crime is established. On perusal of Exh.58, appellant is stated to have assaulted deceased on his head by an axe due to which he fell down. However, as already stated earlier in the absence of any other substantiative and corroborative evidence on record such statements of appellant do not substantiate the case of prosecution. For that purpose, we find it useful to refer to the decision in the case of **Raj Kumar Singh @ Raju @ Batya ..vs.. State of Rajasthan** reported in **AIR 2013 SC (Criminal) 1630** wherein while considering scope of provisions of Section 313 of Cr.P.Code in para nos.25 and 26 of judgment it is observed thus

In a criminal trial, the purpose of examining the accused person under Section 313 Cr.P.C., is meet the requirement of the principles of natural justice i.e. Audi alteram partem. This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him, and the Court must take note of such explanation. In a case of circumstantial evidence the same is essential to decide whether or not the chain of circumstances is complete. No matter how weak the evidence of the prosecution may be, it is the duty of the Court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him. The circumstances which are not put to the accused in his examination under Section 313 Cr.P.C. cannot be used against him and have to be excluded from consideration. The effect that statement under Section 313 Cr.P.C. is recorded to meet the requirement of the principles of natural justice as it requires that an accused may be given an opportunity to furnish explanation of the incriminating material which had come against him in the trial. However, his statement cannot be made a basis for his conviction. His answers to the questions put to him under Section 313 cannot be used to fill up the gaps left by the prosecution witnesses in their depositions. Thus,

the statement of the accused is not a substantive piece of evidence and therefore, it can be used only for appreciating the evidence led by the prosecution, though it can not be a substitute for the evidence of the prosecution. In case the prosecutions evidence is not found sufficient to sustain conviction of the accused, the inculpatory part of his statement cannot be made the sole basis of his conviction. The statement under Section 313 Cr.P.C. is not recorded after administering oath to the accused. Therefore, it cannot be treated as an evidence within the meaning of Section 3 of the Evidence Act, though the accused has a right if he chooses to be a witness, and once he makes that option, he can be administered oath and examined as a witness in defence as required under Section 315 CR.P.C. An adverse inference can be taken against the accused only and only if the incriminating material stood fully established and the accused is not able to furnish any explanation for the same. However, the accused has a right to remain silent as he cannot be forced to become witness against himself. (Para 25, 36)

Therefore, in the absence of any other evidence which would establish that it was the appellant and appellant alone who had committed offence, no conviction can be sustained. Merely because deceased being husband of accused who died of a homicidal death, and as his body was found in the house where he was residing with the accused is by no stretch of imagination is sufficient to rope the accused in this Crime, for want of convincing evidence. As such accused is entitled to be given benefit of doubt.

In the result, we pass the following order.

ORDER

Criminal Appeal No.508 of 2012 is allowed.

Impugned judgment and order of conviction and sentence dated 8th of October, 2012 passed by the learned Sessions Judge, Chandrapur convicting the appellant for the offence punishable under Section 302 of the Indian Penal Code and sentencing her to suffer imprisonment for life and to pay a fine of Rs.5000/-, in default to undergo R.I. for six months, is set aside.

Appellant is acquitted of the offence for which she was charged and convicted by the Trial Court Appellant be released forthwith if not required in any other offence.

Fine amount, if any paid by the appellant, be refunded to her.

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