

Sunil Vs. The State of Maharashtra, Through the P.S.O.

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Court : Mumbai Nagpur

Decided On : Mar-28-2016

Judge : B.R. Gavai & A.S. Chandurkar

Appeal No. : Criminal Appeal No. 592 of 2013

Appellant : Sunil

Respondent : The State of Maharashtra, Through the P.S.O.

Judgement :

Oral Judgment: (A.S. Chandurkar, J.)

1. The appellant who has been convicted for the offence punishable under Section 302 read with Section 201 of the Indian Penal Code (for short, the Penal Code) has challenged judgment dated 31/07/2013 passed by the learned Additional Sessions Judge, Chandrapur in Sessions Case No.82 of 2012.

The case of the prosecution as can be gathered from the material on record is that on 08/05/2012 a call was received by the City Police Station, Chandrapur that a foul smell was coming from a house owned by one Harishchandra Chamate. The appellant along with his family was residing therein. Said Harishchandra came on the spot after which the lock of the door was broken by the police. There the dead body of one Panchafula, the sister of Harishchandra was found. On that basis, said Harishchandra lodged his report on 08/05/2012.

2. After the report was registered, investigation was carried out. A chargesheet was duly filed in which the appellant was arrayed as an accused for the offence punishable under Section 302 of the Penal Code. The case was committed to the Sessions Court and as the appellant did not plead guilty, he was tried for aforesaid offence. At the conclusion of the trial, the appellant was convicted as stated herein above.

3. Shri R. M. Daga, the learned counsel for the appellant submitted that the appellant had been wrongly convicted by the Sessions Court. According to him, there was no eye witness to the incident and that merely on the basis of surmises, the appellant had been convicted. It was submitted that the presence of the appellant was not shown in the house at any time proximate to the incident. In absence of presence of the appellant being proved, it was not permissible for the prosecution to rely upon the provisions of Section 106 of the Evidence Act for convicting the appellant. It was then submitted that the appellant was married in the year 2001 and there was no earlier report with regard to ill treatment of the deceased at his instance. There were various contradictions in the version of PW-1 who was the brother of the deceased as well as PW-5 who was the daughter of the appellant. It was further submitted that even the time of death of Panchafula was not brought on record and therefore in absence of such evidence, it would not be safe to convict the appellant for the aforesaid offence.

In support of aforesaid submissions, the learned counsel placed reliance on the judgments of the Division Bench in ***Sharad s/o Kondiba Walke vs. State of Maharashtra 2010 ALL MR (Cri) 899*** and ***Subhash Gorakh Khankal vs. The State of Maharashtra 2015 ALL MR (Cri) 2481***.

4. On the other hand Shri S. M. Ghodeswar, learned Additional Public Prosecutor supported the judgment of the Sessions Court. It was submitted that the appellant being the husband of the deceased, it was for him to explain the manner in which the deceased received fatal injuries. He submitted that the appellant had left his daughter at house of PW-1 with the clear intention of doing way with his wife. It was urged that as the appellant was the husband and the couple was residing together, it was for the appellant to explain the aforesaid under Section 106 of the

Evidence Act. No such explanation was forthcoming from the appellant. It was further submitted that PW-3 had deposed about the demand of dowry by the appellant which was another circumstance against the appellant. It was therefore submitted that the learned Judge of the Sessions Court was fully justified in convicting the appellant.

5. With the assistance of the learned counsel for the parties we have gone through the entire records and we have given due consideration to their respective submissions. The homicidal death of Panchafula is sought to be proved by relying upon the Post Mortem Report. PW-8 Dr Shital Todase was examined vide Exhibit-37. According to her, Panchafula died due to head injury with fracture on right temporal and frontal bone with extra dural and intracranial haemorrhage with asphyxia due to strangulation. The Post Mortem report is at Exhibit-38. There is no serious challenge to the aforesaid report in the cross examination of said witness. Accordingly, it is held that the prosecution has succeeded in proving the homicidal death of said Panchafula.

6. To bring home the guilt of the appellant, the prosecution has examined PW-1 Harishchandra below Exhibit-17. He was the brother of Panchafulabai. According to him, on 05/05/2012 he had brought the daughter of the appellant from the boutique of her mother to his house. On the same day, in the evening, he along with his family members went to Warora for attending a marriage. He returned back on 08/05/2012, after which he received a phone call that there was some bad smell coming from his house. He got knowledge of the incident on that basis. In his cross-examination, he has denied that he had not visited the work place of his sister on 05/12/2012.

7. The mother of the deceased, Shakuntala was also examined as PW-3 below Exhibit-26. He has stated that on 05/05/2012, between 7 p.m. to 7.30 p.m. the appellant along with his mother had come to their house and demanded a sum of Rs.2,00,000/-. After some time both of them left the place. In her cross-examination, this witness admitted that she had not informed either her son or her husband about the demand made by the appellant. She has further denied suggestion that on 05/05/2012 at about 11 a.m. Harishchandra had brought the

daughter of the deceased to their house.

8. The prosecution has also examined the daughter of the appellant as PW-5 below Exhibit-28. She stated that on 05/05/2012 at about 2.30 p.m., Harishchandra had taken her to his house. She has further stated that on the same day between 7 p.m. to 7.30 p.m. the appellant and his mother had visited her grand mother's place. In her cross-examination, certain omissions as found in her police statement were put to her. She has denied that on 05/05/2012 in the evening her father had left the house for attending a marriage.

9. It would first be necessary to consider as to whether the prosecution has brought on record the time of death of Panchafula. The house in question from where the body of Panchafula was found was locked. Said lock was broken in presence of the informant and the witnesses on 8-5-2012. PW-8 Dr. Shital Todase in her deposition stated that the exact time of her death before 4 pm on 08/05/2012 could not be stated. She further stated that in the month of May, the process of decomposition of the dead body would be faster. Rigor mortis could be well developed within 48 hours in the summer season. The Post Mortem report at Exhibit-38 states that the body was totally decomposed and rigor mortis was well marked in all the limbs. Thus, there is no material on record to indicate the probable time of death of Panchafula.

10. It would then be necessary to consider as to whether the prosecution has proved the presence of the appellant at the place where dead body of Panchafula was found. Though it is a fact that the appellant was the husband of Panchafula and they were residing together, in absence of any cogent evidence indicating the proximate time of death coupled with fact that the same is likely to have taken place between 05/05/2012 and 08/05/2012, it would be necessary for the prosecution to prove the presence of the appellant during said period at the site of the crime. PW-12 who had carried out the investigation on receiving the phone call regarding foul smell emanating from the premises admitted in his cross-examination that during his investigation, he found that the deceased was alive till about 2.30p.m. on 05/05/2012. He further admitted that during his investigation, the appellant was not found on the spot or at a place nearby between 2 p.m. on

05/05/2012 till he arrived at the spot on 08/05/2012. He further admitted that he had not recorded the statement of the owner or servants working in the boutique where Panchafula used to go.

No other witness examined by the prosecution has deposed about the presence of the appellant at the spot of the incident between 2.30p.m. on 05/05/2012 till 08/05/2012 when the body of Panchafula was found. It will thus, have to be held that the prosecution has failed to prove the presence of the appellant near the site of the incident during the relevant time.

11. It would now be necessary to consider provisions of Section 106 of the Evidence Act, 1872. As per Section 106 of the Evidence Act, 1872, when any fact is especially within the knowledge of any person, then the burden of proving that fact is upon the said person. It is well settled that Section 106 of the Evidence Act, 1872 does not relieve the prosecution of the burden of proving its case beyond all reasonable doubt. It is only when the prosecution case has been proved that the burden with regard to such facts which are within the special knowledge of the accused could be shifted on the accused for explaining the same. Reference in this regard can be made to the judgment of the Hon'ble Supreme Court in ***Vikramjit Singh Vs. State of Punjab 2006 (12) SCC 306.***

In ***Sharad Kondiba Walke (supra)***, the Division Bench while considering aforesaid provisions held that if the initial presence of the accused has not been established by the prosecution, the question of invoking the provisions of Section 106 of the Evidence Act, 1872 would not arise. It is only after initial burden of establishing the presence of the accused at the site of the crime is discharged that the provisions of Section 106 of the Evidence Act, 1872 could be applied. Similar view has been taken by the Division Bench in ***Subhash Gorakh Khankal (supra)***.

12. Thus, from the aforesaid, once it is found that the prosecution has failed to show the presence of the appellant at some time proximate to the occurrence of the crime, the provisions of Section 106 of the Evidence Act, 1872 cannot be applied. Moreover, the present case being based on circumstantial evidence, each circumstance leading to the guilt of the appellant is required to be proved independently and beyond reasonable doubt. The presence of the appellant near

the scene of the incident having not been satisfactorily proved and the same being one of the major links in the chain of circumstances, it will have to be held that the prosecution has failed in proving the guilt of the appellant. The evidence on record is not sufficient to sustain the conviction of the appellant. He would be entitled for benefit of doubt.

13. In view of aforesaid, the impugned judgment convicting the appellant cannot be sustained. Accordingly the following order is passed :

(i) The appeal is allowed. The judgment of conviction in Sessions Trial No.82 of 2012 dated 31/07/2013 is quashed and set aside.

(ii) Appellant be set at liberty forthwith, if not required in any other case.

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