Shaikh Ayub

Vs

State of Maharashtra

Criminal Appeals Nos. 20-21 of 1998

(G. T. Nanavati, M. Jagannadha Rao, A. P. Mishra JJ)

26.02.1998

JUDGMENT

NANAVATI, J. –

1. Both these appeals arise out of the common judgment of the High Court of Judicature at Bombay in Confirmation Case No. 3 of 1997 and Criminal Appeal No. 86 of 1997. They are, therefore, disposed of by this common judgment.

2. The appellant was tried for committing murder of his wife Taslimbi and his five children aged about 9 years, 7 years, 5 years, 3 years and 2 years, inside his own house, during the night intervening 5-2-1995 and 6-2-1995 at about 1.30 a.m. This being the case of circumstantial evidence, the prosecution examined witnesses to establish certain circumstances which indicated that the appellant had caused the deaths of his wife and five children. The circumstances relied upon by the prosecution and held proved are :

> "1. The appellant was suspecting character of his deceased wife Taslimbi and therefore he had motive to commit the crime in question.
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> 2. The incident in question had taken place in the house where the appellant was residing along with his wife Taslimbi and five children.
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> 3. The deceased Taslimbi and five children of the accused were last seen alive with the appellant-original accused at about 8 p.m. on 5-2-1995 in the house of the appellant.
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> 4. The appellant and his family members used to sleep in the middle room of the house and after meals on that day the appellant and his family members went to sleep in the middle portion of the house.
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> 5. PW 8 Hasinabi was sleeping in the back room of the house and the door adjoining to her room was closed from inside.
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> 6. At about 1 or 1.30 a.m. on 6-2-1995 shouts and cries were heard by PW 3 Shaikh Aslam who was sleeping on the roof and neighbours which were coming out of the middle room of the house of the appellant. PW 3 Shaikh Aslam therefore woke up PW 8 Hasinabi.
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> 7. Since PW 8 Hasinabi was sleeping in the rear side of the room it was impossible

for anyone to enter in the house from that direction or go out from that direction.

8. The eastern side door of the middle room was broken open with the help of 'Chimta'. The spot panchnama shows that the door was broken open and 'Chimta' was found on the spot.

9. PW 4 Firoz Khan and PW 5 Abdul Rehman had seen the appellant-accused sitting inside the room.

10. The report of Chemical Analyser shows that human blood was detected on the clothes of the appellant-accused and it was of the deceased.

11. In view of the medical evidence it is clear that the injuries to the children were caused by axe. Article 11 was found inside the room.

12. The cause of death of Taslimbi as opined by the doctor is by strangulation and if it is so the possibility that she could have caused death of her children is ruled out.

13. The blood of 'A group' of deceased was detected on the clothes of the appellant and also on the axe.

14. The appellant went to sleep in the middle room along with his wife and children after taking meals and was alone in the room in question at the time of incident.

15. The first information report was lodged immediately after the incident in question.

16. The subsequent conduct of the appellant is most abnormal. The appellant did not make any hue and cry after seeing his own wife and children being killed in most violent and gruesome manner nor he tried to inquire from the people regarding cause of death.

17. The appellant had taken the plea of alibi and the same cannot be said to be established in the facts of the case."

The trial court held the appellant guilty and sentenced him to suffer death. As death sentence was imposed the trial court made a reference to the High Court for its confirmation. The appellant also appealed to the High Court against his conviction and sentence.

3. The High Court after considering the evidence of PWs 3, 4, 5 and 8 and also the medical evidence held that the aforesaid circumstances can be said to have been proved by the prosecution beyond reasonable doubt. It also held that the chain of circumstances was complete and did not leave any doubt regarding the guilt of the appellant. It also held that the sentence of death was justified in view of the facts and circumstances of the case. It, therefore, accepted the reference, confirmed the sentence of death, and dismissed the appeal filed by the appellant.

4. What is contended by the learned counsel for the appellant is that the evidence of PW 3, Aslam (the first informant) and PW 8 Hasina instead of establishing the prosecution case supports the defence version that after taking his meal and appellant along with his brother Siddiq had gone to

their field and was not present in the house at the time of the incident. He submitted that both these witnesses have stated that the doors of the room in which Taslimbi and her children were sleeping were chained from inside and when one of the doors was broken open no one else was seen inside and that indicates that in all probability Taslimbi had killed the children and then strangulated herself. He also submitted that the evidence of PW 4 Firoz that he had seen the accused sitting in the middle room smoking a bidi does not deserve any credence because he had not gone inside the house and as admitted by him he had told the police that the appellant had killed his wife and children as people who had gathered there were talking like that. He also submitted that the evidence of PW 5 Abdul Rehman is no better as he had not stated before the police that Ayub was seen sitting inside the room, and had said so for the first time in the Court. He did not have any talk with PW 3 Aslam and had come to know that the appellant had killed his wife and children from the people who had gathered there.

5. We have carefully gone through the evidence. PW 3 Aslam was staying with his maternal uncle Ayub. He has stated that he woke up on hearing cries coming from the room in which Ayub, Taslimbi and their children were sleeping. He came down from the roof where he was sleeping and tried to go inside that room but it was closed from inside. In spite of knocking of the door by him, Hasina and other neighbours who had gathered there soon thereafter, the door was not opened. After about 10 minutes one of the doors of that room was broken open. Taslimbi and her children were seen lying dead. Even though this witness had gone to the police station and lodged the FIR wherein he had stated that Ayub was also seen sitting there smoking a bidi, he denied to have done all that and stated before the court that no one else was found inside the room and that Ayub after taking his evening meal had gone to his field. He was, therefore, declared a hostile witness and was cross-examined by the Public Prosecutor. It becomes apparent from his cross-examination that he had stated so in order to save the appellant who is his maternal uncle and who was maintaining him. It was urged by the learned counsel that the fact that copy of the FIR had reached the Magistrate on 10-2-1995 creates a serious doubt regarding the date and time when the FIR was prepared. He also drew our attention to the evidence of PW 3 Aslam who had stated that the police had prepared some writing after coming to the village and had taken his thumb impression on it. We do not find any substance in this contention because after recording the FIR at 7.30 a.m. the Investigating Officer had proceeded to the place of the incident and prepared inquest reports. The evidence of panch witness PW 6 and the inquest reports show that work of preparing inquest reports had started at 8 a.m. The inquest reports and other panchnamas also contain the number of FIR. Therefore, there can be no doubt that the FIR had come into existence before 8 a.m. on 6-2-1995. Even though it had reached the Magistrate after three days that delay cannot, in view of the other evidence, create any doubt regarding its genuineness. It was also submitted by the learned counsel that in the inquest panchnamas Exhibits 19, 20, 21, 22, 23 and 24 name of Ayub was not mentioned as the person who had caused the deaths and that also indicates that till they were completed it was not known who had caused the deaths of those six persons. There is no substance in this contention also. There is no requirement of law or any rule that an inquest panchnama should contain name of the accused. An inquest panchnama is a report required to be made by the Investigating Officer with respect to the apparent cause of death. It is to be prepared in the presence of two or more respectable inhabitants of the neighbourhood and has to describe the wounds, fractures, bruises and other marks of injuries as are found on the dead body and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted. Therefore, from the absence of the name of accused in the panchnamas it cannot be inferred that his name was not disclosed as the murderer till they were completed.

6. PW 8, Hasina, being the brother's wife of the appellant, also resiled from her earlier statement

and stated before the court that the appellant was not present when the incident had happened and that he came back from the field when he was sent for. She was also declared a hostile witness and was cross-examined by the Public Prosecutor.

7. In view of the other reliable evidence the courts below were right in holding that PW 3 and PW 8 were not telling the truth when they stated that when the door was broken open Ayub was not seen inside the room. In our opinion, the courts below were right in believing the evidence of PW 4 Firoz Khan and PW 5 Abdul Rehman. Both of them were neighbours of Ayub and they had no reason to falsely involve him in such a serious offence. Even though PW 3 Aslam and PW 8 Hasina had stated that Ayub had gone to his field after taking his evening meal it is significant to note that PW 8 Hasina stated in her cross-examination that the door was broken open in the presence of Ayub. The version of PW 8 Hasina was that Ayub was sent for and he came within a short time and thereafter in his presence the door was broken open. It was not suggested to PW 4 and PW 5 that the door was broken open after Ayub had returned from the field. On the contrary the suggestion made to these witnesses was that Ayub had returned from the field at about 4 a.m. The evidence of the witnesses is consistent that the cries were heard sometime around 1.30 a.m. and within 10 minutes the neighbours had collected and the door was broken open. It was submitted by the learned counsel for the appellant that PW 4 had no talk either with Ayub or with PW 3 Aslam and he had stated that Ayub had killed his wife and children on the basis of the talk amongst the persons who had collected there. It was also submitted that this witness had not gone inside the room and, therefore, it was doubtful if he had really seen Ayub in that room. The witness has categorically stated that he had gone near the door and had seen the accused sitting in that room and at that time he was smoking a bidi. He explained that he had no courage to go inside the room as he had seen dead bodies of six persons lying there. There is nothing on record to show that a person standing near the door could not have seen inside the room. Therefore, the evidence of this witness cannot be discarded on this ground. His evidence clearly establishes that when the door was broken open the accused was found sitting in the room and at that time he was smoking a bidi.

8. The learned counsel assailed the evidence of PW 5 on the ground that this witness had stated for the first time in the court that he had seen accused Ayub sitting inside the room. This witness was sought to be contradicted with his previous statement recorded by the police by generally putting to him that there was no mention in that statement of his having seen accused Ayub inside the house. He denied that he was telling for the first time in the court that the accused was seen inside the room. It is true that this witness had not specifically stated that accused Ayub was seen in the room. PW 11, PSI Ved Pathak has proved that omission. In fact, the witness had stated in his police statement that when the door was broken open and when he and Aslam has seen inside they had noticed that Ayub had killed his wife by strangulation and his children by axe blows. Instead of saying the two things what he has seen and what he had inferred - separately he had stated that Ayub had killed his wife and children. It is, therefore, not correct to say that this witness had for the first time stated before the court that Ayub was seen inside the room when the door was broken open and he had gone inside that room. We find that both the courts below had rightly appreciated the evidence of PW 4 and PW 5. Their evidence along with other circumstances held established, deserved to be believed as it did not suffer from any infirmity. Their evidence proves beyond doubt that Ayub had killed his wife and his five children. He has, therefore, been rightly convicted under Section 302 IPC.

9. But, we do not think that this is a fit case in which death sentence should have been imposed. The evidence discloses that Ayub had some suspicion regarding the character of his wife. The facts and circumstances of the case clearly indicate that the appellant had killed his wife and also his children

because of unhappiness and frustration and not because of any criminal tendency. We, therefore, set aside the sentence of death and direct that for the murders committed by him, he shall suffer imprisonment for life. Subject to this alteration in the sentence, these appeals are dismissed.