SUPREME COURT OF INDIA

Yuvaraj Ambar Mohite

Vs.

State of Maharashtra

Crl.A.No.1512-1513 of 2005

(S.B. Sinha and Dalveer Bhandari JJ.)

19.10.2006

JUDGMENT

S.B. SINHA, J :

Jubedabai, deceased although a lady was of unique character. She although passed medical course from Burhanpur and initially started medical practice, she was earning her livelihood by driving an autorickshaw. The first informant, Yusuf Sardar Pinjari (PW-1) was her foster brother. Ashraf Yusuf Pinjari who examined himself as PW-3 was son of PW-1. He at the relevant time was a minor. Jubedabai Abdul Rajjak Shaikh who examined herself as PW-4 was the younger sister of the deceased. Appellant herein was an employee of the State Reserves Police. He was an accused of commission of an offence under Section 326 of the Indian Penal Code for causing hurt to another autorickshaw driver Macchindra Baburao Thombare (PW-2). The deceased was called upon to mediate in the said dispute. PW-2 with a view to settle the dispute between himself and Appellant herein met each other in the morning of 3.9.1988. Appellant thereafter came to the residence of the deceased. He was of black complexion and was sporting beard. The deceased at about 10.30 11.00 a.m. was standing in the balcony of her house. She invited PW-1 for meals as the food was being cooked. He went inside the room and found Appellant present there. They were consuming liquor. PW-3 was asked to bring more liquor. While the deceased, Appellant and PW-1 were in the room, PW-4 Jubedabai Abdul Rajjak Shaikh (sister of the deceased) came. She requested for some money for seeing a movie. The deceased gave her Rs. 5/- for the said purpose.

PW-1 finished his lunch early and returned home to have a nap. He overheard the deceased and Appellant conversing in relation to settling of a matter by way of compromise. The deceased gave PW-3 Ashraf a sum of Rs. 11/- for purchasing mutton for the dog. He enquired about the identity of Appellant to which the deceased named him. He recollected that he had seen him teaching Judo Karate in School No. 9. He brought three bottles of beer, payments whereof was made by Appellant. When he was delivering the third bottle of bear, he saw the deceased adjusting the channel of the TV and Appellant had been standing near her and had put his hand round her neck. They mixed drinks. PW-3 further saw Appellant recoiling on the body of the deceased. He thereafter went to his uncle's place for watching a serial in T.V. He came back at about 4.00 p.m. The door was locked. He was not allowed entry in the room. PW-4 after witnessing the movie also came back in the meanwhile. Appellant allegedly opened the door partially and peeped through the top of it and

informed her that the deceased was sleeping.

PWs 3 and 4 separately came to the house of PW-1. He was awakened up and was informed that the room of the deceased was locked from inside. In the meantime, the dog of the deceased was seen out. It was brought back to the house by PW-1 and chained. They took a cup of tea there, and then came back to the place of occurrence. The deceased was found lying unconscious on the bed. Dr. Vasant Kesha Manekar (PW-5) who used to reside on the ground floor of the house was requested to examine her. He on examining declared her dead.

PW-4 was asked by the doctor to report the matter to the police. She declined whereupon Dr. Manekar himself lodged a report on the basis whereof a First Information Report (FIR) was lodged at about 1730 hrs. PW-1 in his First Information Report not only gave description of Appellant but also categorically stated that to his knowledge the boy sporting beard was facing a prosecution in the court and the deceased was a witness therein. Appellant was arrested within 12 hours from lodging of the First Information Report on the basis of his description given in the FIR.

Appellant was charged for commission of an offence under Section 302 of the Indian Penal Code. He pleaded not guilty thereto. The prosecution in support of its case examined ten witnesses. PW-2 was the complainant in the case against Appellant wherein the deceased was mediating. PW-5 is the first informant who had examined the deceased and declared her dead.

Dr. Prakash Patil (PW-9) who conducted the autopsy opined that the death was homicidal in nature. The doctor opined that the death was caused due to extensive head injuries with associated evidence of throttling. He found the following injuries on the person of the deceased:

(1) Linear transverse cuts (probably sharp cutting instrument), left index, middle ring finger and right index and middle fingers. (2) Contusion and swelling on the lower lip.

(3) Contusion over the anterior side of the neck and small contusion on right side of neck and three linear contusions left side of the neck with scratches probably due to nails.

(4) CLW 1 cm x 1 cm over bridge of the nose

(5) CLW 3 cm x 2 cm on left parietal region with evidence of Haemotoma

(6) Multiple small contusions present on medial aspects of both thighs

(7) Contusion over the left leg near medial malleolus (8) Contusion on right leg posteriorly.

Bhagwan Sabaji Talewar (PW-7) in his deposition stated that Appellant had informed him on the date of incident that he would not be available for Judo class in the evening. He was declared hostile. Vijay Ramchandra Deokar (PW-8) is a driver of autorickshaw. He deposed that Appellant had travelled in his autorickshaw from pan shop on Jail Road to SRPF Camp and then to his residence.

PW-10 was the Investigating Officer.

The learned Trial Judge as also the High Court recorded a judgment of conviction against Appellant

relying on the evidence of PWs. 1, 3 and 4.

Mr. U.U. Lalit, learned senior counsel appearing on behalf of Appellant submitted that the prosecution cannot be said to have proved its case beyond all reasonable doubt. It was urged that the entire case being based on circumstantial evidence, the links of the chain cannot be said to have been established. The learned counsel would contend :

(i) It was not proved that the green colour moped said to be belonging to Appellant was used by him for coming to the residence of the deceased.

(ii) If the moped belonged to him, there was no reason as to why he would travel in an autorickshaw after the incident. (iii) The testimony of the prosecution witnesses, viz., PWs 1, 3 and 4 cannot be relied upon as according to PW-1, PW-3 did not come to see him in the evening and only PW-4 came. (iv) From the deposition of PWs 3 and 4, it is not established that Appellant was last seen with the deceased.

(v) PW-3 was a child witness and his testimony could not have been relied upon without corroboration particularly in view of the fact that he could not identify Appellant in court. (vi) The blood stained banian of Appellant was although sent for chemical test by the FSL, the prosecution did not prove that the blood group of the deceased was group 'B'.

(vii) There is no evidence to show as to who had taken the nail clippings so as to prove the evidence of presence of blood in his nails.

(viii) The prosecution failed to prove any motive on the part of Appellant.

(ix) Although the prosecution charged Appellant for commission of a rape of the deceased but the same had not been proved.

The learned counsel appearing on behalf of the State, on the other hand, submitted that:

(i) the presence of Appellant in the room of the deceased for a long time having been proved and as he was the person last seen in the company of the deceased, it was for him to explain as to how she met her death.

(ii) Appellant was sporting beard on the day of incident and the date on which PW-3 was examined in the court as he was not having beard, PW-3 could not identify him and, thus, the same cannot be held to be fatal.

(iii) It was pointed out that as soon as a photograph of Appellant with beard was shown to him, he identified the same to be that of the said accused and as such it cannot be said that he was a tutored witness.

(iv) The circumstances against Appellant were sufficient to bring home the charge of murder.

The death of the deceased being of a homicidal nature is not in dispute. It has not further been disputed that at the instance of PW-2 a case under Section 326 of the Indian Penal Code was pending against Appellant. It is furthermore not in dispute that the deceased was one of the

witnesses in the said case. The deceased and PW-2 were autorickshaw drivers. Appellant was a teacher of Judo Karate and was teaching in School No. 9 situated at Dhule. He was well acquainted with the deceased who was mediating in the dispute between him and PW-2. On 2.9.1988, Appellant came to the hotel near S.T. Stand where the deceased and PW-2 had been taking tea and she requested him to compromise the matter pursuant whereto on 3.9.1988 PW-2 met the deceased at about 10 a.m. at the said place. She had expressed her dissatisfaction that PW-2 had not seen Appellant as promised.

The relationship between the prosecution witnesses and the deceased is not in dispute. From the materials on record, it appears that they had been residing in parts of the same premises. It is also not in dispute that Appellant was sporting beard at the relevant time. The descriptions of Appellant as disclosed by PWs 1, 3 and 4 are also not denied. PW-1 did not know Appellant. According to him, he had seen him for the first time in the room of the deceased. He was there for some time, had his meals with them then he went to his house and went to bed.

PW-3 was a child witness. The learned Sessions Judge satisfied himself that he was capable of deposing before a court of law. He categorically stated that his father used to treat the deceased as his sister. He used to visit her house very often. He used to help her in purchase of mutton, milk, vegetables, etc. The deceased called him on that day for purchasing mutton. When he went to deliver the same, he saw Appellant. On his query, the name of Appellant was disclosed. He identified him as a person teaching Judo Karate in School No. 9. It may be true that he had not been able to identify Appellant in court because he was not having beard but he was identified when his photograph was shown to him. In his evidence, he categorically stated that not only his father, the deceased and Appellant had been taking liquor but he also disclosed that they were consuming whisky mixed with beer while taking meal. As he saw Appellant recoiling on the body of the deceased, he went to the balcony as he had become ashamed on seeing the same. He was given a sum of Rs. 100/- for getting a bottle of liquor. He brought it. He was asked again to get another bottle. He did so again. They consumed the same whereafter he was again asked to bring a third bottle which request was also complied with. He found the deceased adjusting the channel of TV and Appellant had been standing nearby with his hand around the neck of the deceased. He remembered also the title song of the serial which was being exhibited in the TV. He categorically stated that when he came back in the afternoon, he was not allowed to go inside by Appellant. PW-4 also came and she was also not allowed to go inside on the plea that the deceased was sleeping.

There may be little discrepancies as regards waking up of PW-1. There may also be some discrepancies in the evidences of PW-1 and PW- 3 as regards his presence in the house. But then there is no inconsistency in regard to the other details. PW-3 had been cross-examined but nothing tangible has been brought on records to discredit his testimony. He has answered each and every question put to him in cross-examination. The evidence of PW-3 was also corroborated by the post mortem report which shows that there was 122 mg. and 117 mg. of Ehtyl Alcohol per 100 gms. in the two samples of viscera, i.e., stomach/ intestine and spleen/ liver which according to the medical evidence proved excessive consumption of liquor by the deceased. Appellant had procured three bottles of liquor and evidently saw to it that the deceased came under influence of alcohol.

PW-1, the deceased and Appellant started taking meals at about 11 O' Clock. According to PW-3, after PW-1 left to have a nap, the deceased and Appellant had taken three bottles of liquor which must have taken 2-3 hours time. Appellant, therefore, was in company with the deceased for a considerable time immediately prior to her death. He was seen by PWs 3 and 4 in between 4.00 and

4.30 p.m. The deceased was found dead at about 4.30 or 4.45 p.m. If the evidence of the prosecution witnesses are believed and we see no reason as to why they should not be, the deceased was last seen with Appellant. What would be its effect would vary from case to case. Whether the said evidence shall be relied upon or not would also be subject to other materials which may be brought on record by the parties. The Court may, however, depending on the facts and circumstances of this case look for some corroboration.

In Ramreddy Rajeshkhanna Reddy and Anr. v. State of Andhra Pradesh [JT2006(4)SC16], this Court opined:

"The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case courts should look for some corroboration."

Let us now see as to whether the last seen evidence stands corroborated.

PW-4 is the sister of the deceased. She had not only an occasion to see Appellant, he also knew her as he had invited her in a programme which was being attended by Dr. Mrs. Borse M.L.A. She went to see a movie and came back at about 4-4.30 p.m. when she was prevented from going inside. She and PW-3 both woke up PW-1. PW-1 went out to bring back the dog of the deceased. They came to the house and found the deceased lying on the cot.

She had not at all been cross-examined in material particulars. Apart from the suggestion that the deceased did not disclose the name of Appellant as Mohite and that she had not gone to her house on the said date, no other question was put to her in the cross-examination.

The prosecution might not have been able to prove that the moped which was parked outside the house belonged to Appellant or its colour was green but the same was of not much significance.

Vijay (PW-8), however, proved that he had picked up Appellant from the Jail Road at about 4.30 p.m. and he was brought to his residence.

PW-5 was residing in the same premises. He was asked to examine the deceased who was found unconscious. He categorically stated that he refused to examine her as he had dispute with her. He appears to be a truthful witness. However, PW-4 persuaded him to come to the place of occurrence. He came, examined her and found her dead. He himself went to the police station and lodged a First Information Report. PW-8 also knew Appellant as a teacher of Judo Karate. Appellant was, therefore, well-known in the locality as a teacher in the Judo Karate. As noticed hereinbefore, the fact that he was an accused in a case under Section 326 of the Indian Penal Code at the instance of PW-2 is also not in dispute.

PW-3 could identify him in the said capacity. PW-4 also identified him. According to her, Appellant also knew her from before. PWs 1 and 4 admittedly identified him in the court. PW-3 being a child witness could not identify him without a beard. If he was a tutored witness, he would have identified him even without beard, but he did not do so. It shows that his evidence is reliable. Each of the witnesses had sufficient time to see Appellant and, therefore, his identification in court by them cannot be discarded. Appellant did not deny or dispute before the Trial Court that the

photograph shown to PW-3 was not his. The only contention raised before the Trial Court was that the same was not seized from his house on 4.9.1988. In any event, description of Appellant as disclosed in the First Information Report tallies with that shown in court by the witness.

There is no reason as to why the prosecution witnesses would falsely implicate Appellant. There was also no reason as to why they would identify a wrong person. The prosecution, therefore, proved that Appellant was the person last seen with the deceased. PW-3 had occasion to see him and the deceased together at least four times as he had been asked to purchase mutton and liquor on three occasions. He had also stated in details as to how liquor was consumed by them. Not much imagination is needed to note the effect thereof. PWs 3 and 4 came to the room of the deceased and knocked the door but Appellant did not allow them to enter inside inter alia on the pretext that she was sleeping. Even if it is assumed that PW-4 could not have seen his face as only upper portion of the door was said to have been opened, PWs 3 and 4 must have heard his voice. Appellant talked to them in the morning. There was no reason as to why they would not be able to identify the voice to be that of Appellant. The immediate motive for killing the deceased by Appellant might not have been proved. What transpired in a closed room cannot be known. The circumstances brought on records amply support the prosecution case and in particular the statements of PW-3.

The doctor who conducted autopsy found saree and petticoat of the deceased to be loose. The Gynacologist who examined the dead body of the deceased opined that there might have been intercourse before death. However, the same had not been proved beyond all shadow of doubt. PW-3 had also, as noticed hereinbefore, stated about the manner in which Appellant was recoiling on the body of the deceased which shows the amorous adventure he was making. A screw driver was found at the place of the incident. It was stained with blood. According to the doctor, the fracture sustained by the deceased was possible to be inflicted by it. Appellant was a man of strong physique. He knew Judo Karate. The doctor found contusions on the right side of the neck and three linear contusions on the left side of the neck with scratches probably due to nails. The nail clippings of Appellant were taken. They were found to be stained with human blood. The blood group of Appellant was 'A'. His banian (Ex. 5) and nicker (Ex. 7) were found stained with human blood containing group 'B'.

It is true that blood group of the deceased could not be determined but then the fact remains that the undergarments of Appellant were smeared with blood of a different group. In a case of this nature, having regard to the evidence on records, we are of the opinion that motive takes a back seat.

It may be true that the attention of Appellant had not been drawn to the contents of the reports of the forensic laboratory but the same does not vitiate the judgment of conviction and sentence as he was not prejudiced thereby.

In State (Delhi Admn.) v. Dharampal [(2001) 10 SCC 372], this Court opined:

"Thus it is to be seen that where an omission, to bring the attention of the accused to an in'culpatory material has occurred, that does not ipso facto vitiate the proceedings. The accused must show that failure of justice was occasioned by such omission. Further, in the event of an inculpatory material not having been put to the accused, the appellate court can always make good that lapse by calling upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against the accused but not put to him."

[See also State of Punjab v. Swaran Singh, (2005) 6 SCC 101]

Mr. Lalit complained that no test identification parade was held. As sufficient description of Appellant was given in the FIR and he was arrested soon thereafter, in our opinion, it was not necessary.

We may, however, notice that in Munshi Singh Gautam (dead) and Others v. State of M.P. [(2005)9 SCC 631], this Court opined:

"Test identification parade would be of no consequence in view of Jawahar's (PW 14) evidence that he did not know the physical description of the accused-appellants as he had not seen them on the date of occurrence. What remains is the evidence of Rajkumar (PW 12)."

Yet again in State of Punjab v. Swaran Singh [(2005) 6 SCC 101], this Court went to the extent of stating that despite opportunity the accused did not specifically examine the witnesses in respect of facts deposed by him and, thus, failure on the part of the court to give an opportunity to the accused to answer specifically in regard to the evidence of the said witnesses would be immaterial as thereby he was not prejudiced.

Mr. Lalit contended that only one photograph of Appellant should not have been shown to PW-3 in the court. The learned counsel in this behalf has drawn our attention to a decision of this Court in D. Gopalakrishnan v. Sadanand Naik and Others [(2005) 1 SCC 85] wherein in a matter of investigation this Court opined:

"There are no statutory guidelines in the matter of showing photographs to the witnesses during the stage of investigation. But nevertheless, the police is entitled to show photographs to confirm whether the investigation is going on in the right direction. But in the instant case, it appears that the investigating officer procured the album containing the photographs with the names written underneath and showed this album to the eyewitnesses and recorded their statements under Section 161 CrPC. The procedure adopted by the police is not justified under law as it will affect fair and proper investigation and may sometimes lead to a situation where wrong persons are identified as assailants. During the course of the investigation, if the witness had given the identifying features of the assailants, the same could be confirmed by the investigating officer by showing the photographs of the suspect and the investigating officer shall not first show a single photograph but should show more than one photograph of the same person, if available. If the suspect is available for identification or for video identification, the photograph shall never be shown to the witness in advance."

The said decision cannot be said to have any application in the instant case. We, therefore, have no hesitation in affirming the judgment of the learned Sessions Judge as also the High Court and hold that the circumstances brought on record by the prosecution clearly demonstrate that it was Appellant alone who committed the murder and in that view of the matter absence of motive would be immaterial. [See Mani Kumar Thapa v. State of Sikkim (2002) 7 SCC 157].

For the reasons aforementioned, there is no merit in this appeal which is dismissed accordingly.