SUPREME COURT OF INDIA

Attar Singh

Vs.

State of Maharashtra

Crl.A.No.1091 of 2010

(Swatanter Kumar an Gyan Sudha Misra JJ.)

14.12.2012

JUDGMENT

GYAN SUDHA MISRA, J.

1. This appeal has been preferred against the judgment and order dated 26.6.2008 passed by the High Court of Judicature at Bombay, Bench at Aurangabad in Criminal Appeal No. 7/2007 whereby the High Court upheld the judgment and order passed by the Sessions Judge, Dhule in Sessions Case No. 90/2005 by which the appellant had been convicted for an offence under Section 302, Indian Penal Code (I.P.C. for short) and was sentenced to undergo life imprisonment along with a fine of Rs.1,000/-. In default of payment of fine, he was ordered to undergo simple imprisonment for three months.

2. The appellant was initially charged and tried for an offence under Section 302 and 498-A of the I.P.C. for killing his wife by hitting her on her head with a woodenlog as he was suspecting her loyalty and character.

3. The specific case of the prosecution which was registered under Section 302 and 498-A of the I.P.C. is that the appellant- Attarsingh Barakya Pawara was residing along with his wife and 9 children at village Majanipada in Shirpur Taluk. On 22.6.2005, the complainant-Khandu Kalu Ahire who is also the village Kotwal received an information from one Ramesh Pawara, resident of Majanipada and Appa Shahada Pawara, resident of Fattepur village that the appellant Attarsing has committed murder of his wife by hitting her with a woodenlog on her head. On receipt of this information, the village Kotwal along with the Sarpanch Bhatu Ditya and one Rattan Lalsing went to the appellant's house and found the dead body of

Nagibai (deceased wife of the appellant) lying on the floor of the house which indicated that the deceased had sustained head injury and had bleeded profusely. The woodenlog was found near her dead body and the appellant was also found sitting in the house. The village Kotwal enquired about the incident and questioned the appellant as to how his wife had died. The appellant replied that his wife was of a loose character and, therefore, he had killed her by hitting woodenlog on her head. He narrated the incident to other persons accompanying the village Kotwal.

4. The village Kotwal thereafter came to the police station at Shirpur and lodged the report of the incident (Exh.15) on the basis of which the offence was registered vide crime No. 161/2005 under Section 302 of the I.P.C. The police thereafter completed the usual legal formality by reaching on the spot and as the body was found there, inquest was also conducted and spot panchnama was also prepared whereby the clothes of the accused containing blood stains were seized. Woodenlog (Article No.3) which was found lying on the spot was also seized at the time of preparation of spot panchnama. The body of the deceased was then sent to the Government Hospital, Shirpur where post-mortem was conducted.

5. The accused-appellant was subsequently arrested and taken to the police station. Investigation thereafter followed in course of which it transpired that it was the appellant who had killed his wife Nagibai as he was suspecting her character. Charges were then framed against the appellant under Section 498-A and 302 of the I.P.C. to which the appellant pleaded not guilty and claimed to be tried.

6. In course of trial, the prosecution examined 12 witnesses on the question as to whether the appellant had subjected his wife to cruelty by giving her beating and abuses from time to time suspecting her character. The trial court further examined the question as to whether the accused had committed the murder of his wife Nagibai in his house at village Majanipada and thirdly as to what other offence he has committed.

7. The defence story set up on behalf of the appellant is that his wife had fallen down on the floor of the house due to which she sustained severe head injury which resulted in her death.

8. The trial court on a scrutiny of the evidence and other materials on record rejected the defence story on the basis of the post- mortem report as Dr. Gohil who had conducted post-mortem categorically expressed that the head injury which the deceased Nagibai has sustained were not possible due to fall on the ground.

9. Insofar as the charge under Section 498-A of Indian Penal Code was concerned, the trial court held that none of the prosecution witnesses deposed that the accused-appellant was subjecting his wife Nagibai to cruelty by giving her beating and abuses from time to time as alleged by the prosecution. The learned Sessions Judge recorded that the evidence on record indicates that it was only a single incident in which accused-appellant had assaulted his wife Nagibai suspecting her fidelity and character as the evidence is missing that the accused-appellant was subjecting his wife to cruelty by abusing and assaulting her from time to time. The learned Sessions Judge thus was pleased to hold that the prosecution had failed to prove the charge under Section 498-A of the I.P.C. against the accused-appellant and hence acquitted him of this charge.

10. Insofar as the second charge is concerned as to whether the accused-appellant is the author of the head injury of the deceased, the testimony of the daughter of accused-appellant Mangibai was held to be significant for even though Mangibai had turned hostile, her testimony revealed that on the day of the incident, her father was running behind her mother with a woodenlog for beating her. On witnessing this incident, she started weeping and came out. Thereafter, her father closed the door and only her father and mother were inside the house. Immediately thereafter, her mother Nagibai was found lying injured in a pool of blood inside the house and the accused also was there. It was, therefore, held that this circumstance indicated that it is the accused-appellant who had assaulted his wife and caused her death. It was further held, that though the panch witness Mangibai is a hostile witness, such portion of the hostile witness which is worth believing and which is supported by other circumstances can be used and relied upon by the prosecution in view of well-settled legal position. The Sessions Court thus on a scrutiny and analysis of the evidence accepted the prosecution version based on the evidence on record that the accused-appellant had committed the murder of his wife by hitting her with a woodenlog in his house and recorded a finding in the affirmative to the effect that it is the accused-appellant who committed the murder of his wife-Nagibai in his house at village Majanipada. Thus, the appellant succeeded in securing an order of acquittal in his favour in so far as the charge under Section 498-A of the Indian Penal Code is concerned, but suffered conviction and sentence of imprisonment for life for offence under Section 302 of the I.P.C. for the charge of murder of his wife.

11. The appellant feeling aggrieved with the conviction and sentence preferred an appeal before the High Court of Bombay Bench at Aurangabad, but the High Court confirmed the view taken by the trial court on all aspects including the charge under Section 302 of the I.P.C.

12. Assailing the judgment and order passed by the Sessions Court as also the High Court which concurrently upheld the conviction of the appellant under Section 302 I.P.C., the counsel for the appellant first of all attempted to demolish the case of the prosecution in its entirety by submitting that the conviction and sentence imposed on the appellant was not fit to be sustained on the testimony of the daughter Mangibai as she had not supported the prosecution version totally due to which she had been declared hostile. Hence, it was first of all contended that the testimony of the hostile witness could not have been relied upon for recording conviction of the appellant.

13. We have meticulously considered the arguments advanced on this vital aspect of the matter on which the conviction and sentence imposed on the appellant is based. This compels us to consider as to whether the conviction and sentence recorded on the basis of the testimony of the witness who has been declared hostile could be relied upon for recording conviction of the accused-appellant. But it was difficult to overlook the relevance and value of the evidence of even a hostile witness while considering as to what extent their evidence could be allowed to be relied upon and used by the prosecution. It could not be ignored that when a witness is declared hostile and when his testimony is not shaken on material points in the cross-examination, there is no ground to reject his testimony in toto as it is well-settled by a catena of decisions that the Court is not precluded from taking into account the statement of a hostile witness altogether and it is not necessary to discard the same in toto and can be relied upon partly. If some portion of the statement of the hostile witness inspires confidence, it can be relied upon. He cannot be thrown out as wholly unreliable. This was the view expressed by this court in the case of Syed Akbar vs. State of Karnataka reported in AIR 1979 SC 1848 whereby the learned Judges of the Supreme Court reversed the judgment of the Karnataka High Court which had discarded the evidence of a hostile witness in its entirety. Similarly, other High Courts in the matter of Gulshan Kumar vs. State (1993) Crl.L.J. 1525 as also Kunwar vs. State of U.P. (1993) Crl.L.J. 3421 as also Haneefa vs. State (1993) Crl.L.J. 2125 have held that it is not necessary to discard the evidence of the hostile witness in toto and can be relied upon partly. So also, in the matter of State of U.P. vs. Chet Ram reported in AIR 1989 SC 1543 = (1989) Crl.L.J. 1785; it was held that if some portion of the statement of the hostile witness inspires confidence it can be relied upon and the witness cannot be termed as wholly unreliable. It was further categorically held in the case of Shatrughan vs. State of M.P. (1993) Crl.L.J. 3120 that hostile witness is not necessarily a false witness. Granting of a permission by the Court to cross-examine his own witness does not amount to adjudication by the Court as to the veracity of a witness. It only

means a declaration that the witness is adverse or unfriendly to the party calling him and not that the witness is untruthful. This was the view expressed by this Court in the matter of Sat Paul vs. Delhi Administration AIR 1976 SC 294. Thus, merely because a witness becomes hostile it would not result in throwing out the prosecution case, but the Court must see the relative effect of his testimony. If the evidence of a hostile witness is corroborated by other evidence, there is no legal bar to convict the accused. Thus testimony of a hostile witness is acceptable to the extent it is corroborated by that of a reliable witness. It is, therefore, open to the Court to consider the evidence and there is no objection to a part of that evidence being made use of in support of the prosecution or in support of the accused.

14. While examining the instant matter on the anvil of the aforesaid legal position laid down by this Court in several pronouncements, we have noticed that the support rendered by the daughter Mangibai approving the incident should be accepted as reliable part of evidence in spite of she being a hostile witness. The witness Mangibai's evidence pushes the accused with his bag to the wall and the accused is obliged to explain because her evidence shows that the accused was the only person in the company of the deceased soon before the death. The defence of the accused that Nagibai's injury was a result of fall is ruled out by medical evidence and the details available of the location in the panchnama of offence. The courts below thus have rightly drawn some support from the reports of the chemical analysis since all the articles of the victims and clothes of the accused are found having blood stains of human blood group A. This was in view of the fact that the results of the analysis for determination of the blood group of the victim and accused were conclusive when blood sent to phial was analysed. Thus, the evidence of the daughter of the deceased coupled with other material as also evidence of other witnesses i.e. Ramesh, Khandu, Bhatu and Makhan, provided a complete chain and the prosecution successfully proved that the incident occurred in the manner and the place which was alleged. In fact, the accused in answer to questions under Section 313 Cr.P.C. has admitted his presence at the place of occurrence where his wife Nagibai was lying injured and dead on the floor. However, we do not wish to be understood that the failure of the defence could be treated as success of the prosecution since the conviction cannot be based only on the replies given by the accused, but these replies may be considered as support to the special knowledge of the accused and this lends sufficient weight to the evidence of the daughter of the deceased and other attending circumstances. The trial Judge, in our view, has rightly placed reliance upon the evidence of Mangibai, the daughter of the victim and the accused when she candidly supported the prosecution story when she stated as follows:-

> "When my mother had sustained head injury, my father was there only i.e. near my mother. He was near the oven. He was talking loudly.
>
> It is true that my father hit her with a wooden log and therefore she ran to the kitchen. It is true that my father immediately ran after her. I started weeping. It is true that thereafter my father closed the door from inside."……

15. Thus, we are of the view that the evidence of Mangibai who was declared hostile supported the prosecution case in her cross- examination and, therefore, the courts below do not appear to have fallen into any error in accepting part of the evidence of Mangibai and the retracted confession of the witness Mangibai cannot be accepted to the extent that her evidence in support of the prosecution version was fit to be ruled out. The retracted statement of Mangibai stands fully supported by the evidence of other witnesses. Thus, the material on record along with the evidence of the prosecution witnesses leads to only one inference that the accused-appellant was the author of the injury suffered by the victim and we have rightly been convinced that the accused and the accused alone inflicted fatal injuries upon the person of victim Nagibai. We are, therefore, clearly of the view that in so far as the incident of killing of the deceased Nagibai is concerned, the courts below have rightly held that she was killed by her husband-appellant in the manner which has been alleged by the prosecution.

16. However, learned counsel for the appellant next submitted that the offence alleged to have been committed by the accused- appellant ought to be brought down within the ambit of Section 304 Part II of the I.P.C. as there was only a single blow inflicted by the accused-appellant which is clear from the narration of incident by the daughter of the accused and deceased-Nagibai which shows that the accused was alone with the victim within the house and the accused did not kill his wife with a pre-meditated mind but the incident took place in a fit of anger due to the fact that he was suspecting his wife. It was, therefore, submitted that the accused in fact had no intention to kill his wife as the death had occurred on account of a single blow which was not the result of a pre-plan or pre- meditation. In support of the submission, he relied upon the judgment and order of this Court in the case of Ors. (2008) 17 SCC 411 which also had relied on the judgment in the case of Anil Sharma Ors. vs. State of Jharkhand, (2004) 5 SCC 679, Harbans Kaur vs. State of Haryana, (2005) 9 SCC 195, Amitsingh Bhikamsingh Thakur vs. State of Maharashtra, (2007) 2 SCC 310 and this Court had been pleased to hold that :

"In all cases, it cannot be stated that when only a single blow is given, Section 302, IPC is made out, yet it would depend upon the factual scenario of each case, more particularly the nature of the offence, the background facts, the part of the body where injuries were inflicted and the circumstances in which the assault is made" that the offence under Section 302 IPC is not made out."

In view of the aforesaid observation, learned counsel submitted that offence under Section 302 I.P.C. in the instant matter also cannot be held to have been made out as the deceased had sustained a single blow alleged to have been inflicted by the appellant. Learned counsel for the appellant taking further assistance from the observation of the Supreme Court in the matter ofState of Punjab vs. Bakhshish Singh (supra) submitted further that the past history about the relations between the appellant and the deceased goes to prove that they did not have any strained relations. In fact, they had absolutely normal relations and had nine children out of the wedlock and it was only on the spur of the moment when the appellant abused suspecting the character of deceased Nagibai and beat her with a stick unintentionally that the incident happened. In support of his argument, he relied on the case of Pannayar vs. State of Tamil Nadu by Inspector of Police (2009) 9 SCC 152 wherein this Hon'ble Court held that absence of motive in case of circumstantial evidence is more favourable to defence.

17. The arguments advanced by learned counsel for the appellant-accused when tested in the light of the evidence led by the prosecution while considering whether the charge under Section 302 could be scaled down to Section 304 Part-II, we have already examined the circumstances in which the deceased had been killed and hence it could be noticed that the deceased Nagibai and accused- appellant although had been leading a so-called normal family life along with their nine children, the fact remains that the appellant- husband had been suspecting his wife's character and nurturing deep rooted grudge over a period of time. However, the evidence does further indicate that on the date and time of incident, the appellant had not indulged in pre-planning the incident in any manner so as to eliminate his wife by killing her. The evidence of other witnesses also indicated that the incident of beating had not happened in the past and the daughter of the accused and deceased- Mangibai also deposed that there were heated exchange of words between the couple on the date of incident and the appellant-accused heaped abuses on his wife and then picked up a woodenlog in a fit of anger by which he hit the deceased as a result of which she sustained head injury and bleeded profusely which lead to her death.

18. Thus the appellant although do not appear to have killed his wife by planning out the whole incident in a methodical manner, yet the evidence disclosed that he was nurturing a grudge against the wife over a long period of time and on the date of the incident when the husband started to abuse his deceased wife alleging her of loose moral and character, the accused-husband gave vent to his deep seated grudge by hitting her with such intensity that he did not bother about the consequence of his action. But it cannot be overlooked or ignored that the intensity with which he hit his wife after abusing her is indicative of the fact that he was not oblivious of the consequence which would have resulted from his violent act of beating his wife with a log of wood. Thus, it will have to be inferred that he had sufficient knowledge about the consequence of his heinous act at least to the extent that it was sufficient in the ordinary course of nature to cause death of his wife. He was thus fully aware of the consequence that this would result in a serious consequence and in fact it did result in the said manner since the wife died as a result of the injury inflicted on her. In fact, when the village Kotwal reached the incident, the deceased did not even expressed any remorse for what he had done to his wife nor he appeared to be repentant of the incident. This clearly reflects his state of mind that he committed the crime with full knowledge to kill his wife Nagibai on account of his deep seated grudge which he was carrying since long. Therefore, the submission of the counsel for the appellant that the charge under Section 302 I.P.C. should be converted into one under Section 304 Part-II I.P.C. is fit to be rejected and accordingly we do so.

19. The matter, however, do not set at rest at this stage as the evidence on record and the surrounding circumstances compels us to consider further, whether the offence would be made out under Section 302 I.P.C. or the same would fall under Section 304 Part-I of the I.P.C. since the appellant-accused and his wife-Nagibai had been married for a long time and were having nine children as also the manner of occurrence and the circumstance under which the incident happened does indicate that the incident of hot exchange of words between the accused-appellant and his deceased-wife got precipitated and as the appellant was already aggrieved of his wife suspecting her character, he hit his wife severely with whatever was available without caring for the consequence. Thus, the intention to kill his wife and the knowledge that she would be killed due to the hard hit blow by the log of wood surely cannot be ruled out. We take assistance from the observations of this Court quoted hereinabove that in all cases it cannot be said that when only a single blow is given, Section 302 I.P.C. is made out. Yet it would depend upon the factual scenario of each case more particularly nature of the offence, background facts and

the part of the body where injury is inflicted and the circumstances in which the assault is made.

20. Taking assistance from these apt and relevant considerations when we examined the case of the appellant, we have noticed that the appellant was living with his deceased wife day in and day out, but none of the witness has deposed that she was abused and beaten earlier. Thus, there is lack of evidence that on the fateful day the appellant-husband had the pre-meditated intention to kill the deceased with a log of wood due to which he inflicted the fatal blow on the deceased. The anger and frustration no doubt was acute in the mind of the appellant on account of his suspicion which aggravated due to hot exchange of words and abuses resulting into loss of mental balance as a consequence of which he hit his wife with such intensity that she died on the spot itself. In view of this the appellant will have to be attributed with the knowledge that his act was sufficient in the ordinary course of nature to kill the victim- wife.

21. Thus, in our view, the accused-appellant although might not be attributed with the intention to kill his wife, sufficient knowledge that his act would result into killing her was definitely there in the appellant's mind and he in fact gave vent to his feeling by finally killing her when he hit her with a woodenlog to take revenge for her alleged infidelity without realising that suspicion of her fidelity was not proved and even if it did, that gave no right to him to kill his wife in a brutal manner by hitting her hard enough with a log of wood with such intensity which was sufficient in the ordinary course of nature to kill the victim.

22. There are no dearth of incidents referred in the case laws where the husband has gone to the extent of shooting his wife and many a times a paramour shoots the husband or the husband shoots the paramour on account of suspicion founded or unfounded. But if the evidence discloses that the accused killed the victim in a pre-meditated manner as for instance by using a firearm, the same might be a clear case under Section 302 of the I.P.C. But the facts and circumstances of the incident in which the appellant has been convicted, indicate that the accused-appellant was not armed with any weapon or a firearm. As already noticed the evidence do not disclose in any manner that the appellant had come with a pre-meditated mind to kill his wife, but it was only in course of hot exchange of words and abuses which mindlessly drove him to take the extreme step of beating his wife with a log of wood with such force and intensity that she sustained head injury, profusely bled and finally died on the spot.

23. We are, therefore, of the considered view that although the conviction and sentence of the appellant might not be sustainable under Section 302 I.P.C., it cannot also be scaled down to Section 304 Part-II I.P.C. But we are surely of the view that the appellant is fit to be convicted and sentenced under Section 304 Part-I of the I.P.C. in view of the evidence on record, the surrounding circumstance and the factual scenario in which the incident occurred. We, therefore, set aside the conviction and sentence of the appellant recorded under Section 302 I.P.C. but convert the same under Section 304 Part-I I.P.C. Thus, we deem it fit and appropriate to substitute the sentence of life imprisonment with a sentence of 10 years imprisonment. The appeal thus, is partly allowed. We order accordingly.