IN THE HIGH COURT OF KARNATAKA
KALABURAGI BENCH

THE HON'BLE MR.JUSTICE R. DEVDAS

AND

THE HON'BLE MR.JUSTICE P. KRISHNA BHAT

CRIMINAL APPEAL NO. 3528/2013

Dated:24-07-2020
Subhash and Another vs. The State of Karnataka

JUDGMENT

R. DEVDAS

This criminal appeal filed under section 374(2) of Cr.P.C. is directed against the judgment of conviction in Sessions Case No.18/2011 by the I Addl. Sessions Court Bijapur, sentencing both the accused/ appellants to undergo imprisonment for life and to pay a fine of Rs.15,000/- each, for offence punishable under section 302 read with section 34 of IPC.

2. The case of the prosecution is that one Sharanappa Sidramappa Bisanal (PW.11) lodged a complaint on 31.07.2010 at 6.00 p.m. at Indi police station, Bijapur, stating that his daughter Kamalabai and his son-in-law were residing at Gornal village. Kamalabai was married to Dundappa, about 20 years ago and they have four children. Both the daughters were married and were staying with their spouses. The two sons were unmarried and were helping their father in the

agricultural lands, while the son-in-law Dundappa was also working as an agricultural coolie in the lands of Malakappa Gurusiddappa Ganganalli (PW.3). On 30.07.2010 at about 6.00 in the evening, one Shivappa Parasappa Talawar (PW.2) made a phone call to Vithal Tukaram Kanur and asked him to inform Sharnappa (PW.11) that his daughter Kamalabai has been murdered. On hearing the news, immediately PW.11 along with his family members left to Gornal village. When they arrived they were taken to the land belonging to Siddayya Kalyanayya Hiremath and they found the dead body of Kamalabai. There was a huge injury on the neck and blood was scattered on the spot. When PW.11 enquired from his son-in-law Dundappa, he informed the complainant that at about 9.30 in the morning, Kamalabai brought food pack for him, at the land of Malakappa Ganganalli, where he was working. She gave the food to her husband Dundappa and left towards their field saying that there is a jatra going on in the village, therefore, he too should come back early. At about 5.30 in the evening when Dundappa completed the work for the day and was returning towards their field, he saw the dead body of Kamalabai. When he raised a cry, the persons in the neighborhood came to the spot.

3. It is stated in the complaint that there was a running feud between Dundappa and his cousin brother Subhash S/o Sidram Talawar (accused No.1) with regard to the boundary of their lands, therefore, Subhash and his henchmen have committed the crime,

killing Kamalabai with sharp weapon. He suspects the commission of offence by Subhash (A1) and his henchmen. Therefore, it is prayed that action should be initiated against the accused persons.

4. The FIR was registered the next day i.e. on 31.07.2010 at about 7.00 in the morning. The FIR was received by the Court at about 10.15 p.m. After receipt of the complaint a criminal case in Crime No.125/2010 was registered by the Indi Police Station for offences under sections 302 read with 34 of IPC. During the course of investigation the accused/appellants herein were arrested and they were produced before the jurisdictional Magistrate and thereafter remanded to judicial custody. During the course of trial appellant No.1 was released on bail while appellant No.2 continued to be in judicial custody. The prosecution examined 25 witnesses and got marked 21 documents as Exs.P1 to 21 and 7 material objects as MOs.1 to 7. The defence of the accused was one of total denial. The accused did not choose to lead any defence evidence.

5. It is important to notice that as per the investigation, there were three persons who witnessed

the commission of offence. Vithal and Manjunath (PWs.12 and 13), the two sons of the deceased and Dundappa, and Siddappa Basappa Hachadad (PW.8). PW.8 turned hostile and therefore, in the cross-examination it was put to the witness that on 31.07.2010 he had given a statement before the police to the effect that on 30.07.2010, at about 10.00 in the morning, he heard the screams of Kamalabai and therefore he ran towards the spot; he saw Kamalabai collapsing while accused No.2 had struck the second blow; and at the same time the two sons of the deceased had also arrived at the scene of occurrence; since accused No.2 was brandishing the axe, all the three witnesses ran away from the spot. The witness denied having given such a statement before the police. He denied that he was retracting from the statement out of fear of losing his life at the hands of the accused.

6. According to Vithal (PW.12) who is the elder amongst the two brothers, aged about 15 years on the date of the incident, the deceased Kamalabai had been to the land of Malakappa Ganganalli where her husband Dundappa was working as a coolie, to give him the packed food. Kamalabai left the house at about 9.00 a.m.

taking the food for her husband. Thereafter thetwo brothers left to work in the land belonging to them. When they were working in the field, they heard the voice of their mother and that of the accused. Immediately, they rushed towards the spot. They saw appellant No.1 abusing their mother, using filthy language, to the effect that 'your arrogance/rudeness is more than that of your husband'. Appellant No.1 instigated appellant No.2 to finish Kamalabai. Appellant No.2 assaulted Kamalabai with an axe on her neck. Kamalabai collapsed and started screaming and he assaulted her once again with the axe. Kamalabai fell to the ground. Meanwhile appellant No.1 saw the two sons of Kamalabai. He instigated appellant No.2 to finish both the sons of the deceased. Appellant No.2 ran towards Vithal and Manjunath, brandishing the axe and therefore, both Vithal and Manjunath ran for their life. They ran towards the land of one Kumbhar and there they hid till the next day morning. The next day morning they returned to their house. Meanwhile their grandfather PW.11 had filed the complaint before the police. They informed the grandfather and their maternal uncle about the incident. They informed that the murder was committed in the land of Mathpathi @ Hiremath (Siddayya Mathpathi). Manjunath (PW.13) has also given the same version.

7. Since the motive behind the commission of the offence was a boundary dispute, the defence counsel has elicited some information during the cross-examination. The witnesses PWs.12 and 13 have

admitted that their father had only one brother by name Sangappa. Appellant No.1 is the cousin brother of Dundappa. There was a division of the family property as between the three brothers of appellant No.1 and all of them were living separately. The agricultural lands belonging to appellant No.1 and their father Dundappa were equipped with electrical motors for pumping water. The lands of Dundappa, appellant No.1 and their brothers were adjoining each other. There were six residential houses in the land belonging to Dundappa and his brother Sangappa. The respective families were residing in the houses built on the land. Apart from the six houses, there were also five to six other houses in the adjoining lands.

8. After going through the ocular evidence of PWs.1, 2 and 3, we find that there is a general denial that there was a dispute regarding boundary between the appellants and Dundappa. On the contrary, a suggestion is put in the examination-in-chief itself that appellant No.1 had cut a Banni tree which was on the boundary of the two adjoining lands and therefore Dundappa and the deceased Kamalabai had complained in this regard. Consequently, an informal panchayat

was held calling upon the appellant No.1 to explain why he had cut the tree without the consent of the neighbour. This according to the prosecution had angered appellant No.1 and that became the motive for the offence.

9. Learned counsel for the appellants has vociferously contended that the testimony of the two eyewitnesses was shrouded with falsity, utterly unnatural and therefore the trial Court has erred in believing the testimony of the eyewitnesses. On the other hand, the learned counsel has drawn the attention of this Court to the suggestions put to PWs.12 and 13 that there was an illicit relationship between Kamalabai with one Dhareppa Kumbhar and in that regard there was frequent quarrel between Dundappa and Kamalabai. It was suggested that Dundappa had in fact committed the murder, which was, of course,denied by the witnesses.

10. Per contra, the learned Additional State Public Prosecutor would submit that the reaction of the two young boys, on witnessing the gory incident and on being threatened by appellant No.2, brandishing the axe, running for their life and hiding in some land, cannot be construed as an unnatural act or something that is unbelievable. The learned Additional State

Public Prosecutor submits that it is by now well settled that one should not expect a particular reaction on witnessing a ghastly act of manslaughter. The reactions may differ from person to person and the reaction may also differ owing to the attending surroundings and circumstances. In this regard the learned Additional State Public Prosecutor places reliance on the following decisions.

1. State of Uttar Pradesh vs. Devendra Singh AIR 2004 SC 3690
2. Unreported decision of a Division Bench of this Court in Criminal Appeal No.3593/2010 and connected appeal in the case of Sharnappa vs. State of Karnataka, decided on 06.06.2016.

11. It is pointed out from the two decisions that there is no set rule of natural reaction. To discard the evidence of the witness on the ground that he did not react in a particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way. Commission of murder is not an ordinary incidence. It would shock consciousness and cause fear into a normal person observing such a scene and when a relatively young man was holding a deadly weapon and when the said witnesses have seen the brutal manner in which the murder was committed, it cannot be said that they are expected to act in a vigilant fashion to immediately rush to the police or to rush to village to inform others and act in a

manner as if dictated by a rule.

12. The learned Additional State Public Prosecutor further submits that the axe which was used by appellant No.2 to perpetrate the offence was recovered from a house at the instance of appellant No.2. The bloodstain found on the axe matched with the blood of the deceased, which was found to be ‘A’ group blood. He, therefore, submits that on a comprehensive reading and appreciation of the evidence on record, the trial Court has rightly come to the conclusion that there cannot be any manner of doubt that the alleged offence was committed by the appellants herein.

13. Heard the learned counsel for the appellants, Additional State Public Prosecutor and perused the impugned judgment and original records.

14. On a detailed analysis of the evidence on record, we find several loose ends. As per the testimony of PWs.12, 13 and 14 namely, the two sons of the deceased and her husband, Kamalabai packed lunch for her husband and left the house at about 9.00 in the morning. She gave the lunch pack to her husband who was working in the lands of PW.3. She asked her husband

to come back early so that they could go to the jatra. PWs.12 and 13 specifically stated that their mother did not have breakfast or anything to eat before she left with the food pack for her husband. In the post mortem report it is stated that the stomach of the deceased contained semi digested food. The incident is said to have occurred between 9.30 to 10.00 in the morning. Normally, the food is digested in the stomach within a few hours. It may not be possible that the food taken by the deceased the previous night could still remain in semi digested form in the stomach till 10.00, the next morning. The learned counsel for the appellants has pointed out to this piece of evidence to create a doubt in the mind of this Court as to whether the incident has happened at 10.00 in the morning or later, after the deceased had some food. The learned counsel has further tried to emphasis on this aspect by pointing out to the evidence on record, though as a suggestion, that there was an illicit relationship between the deceased and Dhareppa Kumbhar. The learned counsel submits that it is possible that after the deceased gave the food pack to her husband, she has come back home, had food and thereafter when her husband was coming back from work, he would have found the deceased with the said Dhareppa Kumbhar or may be there was an altercation between the deceased and her husband and her husband may have killed her. This according to the learned counsel cannot be ruled out. Regard being had to the fact that Dundappa has stated in his testimony that he found the dead body of the deceased at about 5.30 in the evening and raised a cry, some

of the neighbours came to the spot, however, Dundappa did not choose to lodge a complaint. He did not request the neighbours who were present at the spot to inform the police. He did not inform his father- in-law (PW.11). He did not enquire about his sons who were missing till the next day morning. The sons on the other hand, state that they hid in some person's landfor more than 24 hours. There is no explanation as to what they did or how they survived for 24 hours withoutfood and water.

15. The loose ends and the suspicion raised by the learned counsel for the appellants cannot be brushed aside lightly. We are not oblivious of the settled position of the law that there cannot be a straight jacket formula to expect a particular reaction from a person who has witnessed a ghastly incident such as murder, more so when a child has witnessed such a gory incident. It is the version of PWs.12 and 13 who were aged about 14 and 15, that they witnessed the incident of a person slaughtering their mother, they run away and hide in some place for more than 24 hours. We should not forget that there are two young boys who are said to have witnessed the murder of their mother. Even assuming that initially they were mortally threatened with the fear of being killed by another young man, they may have run away from the spot. Appellant No.2 who is said to have perpetrated the ghastly act was also aged between 18 and 19 years. There is nothing on record to show that the appellants had a criminal past or that they were seen as dangerous perpetrators. Therefore, assuming that initially the two young boys felt threatened and therefore ran away and hid in an isolated

place, it cannot be accepted that they would hide in some isolated place for more than 24 hours without food or water. On the other hand, one would have instilled some courage in the other to atleast inform their father about the incident. It is also noteworthy to observe that nothing is said about the two sons by the father PW.14. There is a complete silence on the part of PW.14 in explaining what transpired between 5.30 in the evening after he saw the dead body, till the next morning when PW.11 goes to the police station to lodge a complaint. If really PW.14 found the dead body at 5.30 in the evening, he would naturally think of his sons also. He would naturally be forced to think some untoward incident may have happened with the children. He did not try to find out where the children were and neither did the children think of informing the father about the ghastly incident.

16. What further deteriorates the case of the prosecution is that PW.11, complainant, admitted during the cross-examination that after receiving the information over phone, when he arrived at the scene of occurrence by about 9.00 p.m., he found his son-in-law Dundappa and both his grandsons Manjunath and Vithal at the spot along with the other neighbours. It is surprising that the trial Court has brushed aside the vital information elicited from PW.11, stating that the other witnesses have stated that the two boys came back only at 7.00 the next morning. The trial Court has

also erred in expecting independent evidence in this regard from the defence. It is an established position of law that the defence should be permitted to take advantage of the discrepancies in the evidence placed by the prosecution. The very essence of cross-examination is taken away, if the defence is not permitted to take the benefit of its elicitation from the witness during cross-examination. This vital piece of information that PWs.12 and 13 were present at the spot at 9.00 p.m., demolishes the case of the prosecution that PWs.12 and 13 who claimed to have witnessed the incident that they ran away and hid themselves in the land of some person, about 1 km away from the scene of occurrence and they came back only the next day morning, only after PW.11 had lodged a complaint before the police.

17. Since the defence counsel had elicited from PW.11 that PWs.12 and 13 were present at the scene of occurrence at 9.00 p.m., it was argued before the trial Court that non disclosure of the vital piece of information that PWs.12 and 13 had witnessed the incident, in the complaint and FIR and non disclosure of the name of appellant No.2 who is said to have struck the blow on the deceased using the axe, exposes the falsity in the case of the prosecution and proves fatal to

the case of the prosecution.

18. In this regard a decision of the Apex Court in the case of *Ramkumar Pandey vs. State of Madhya Pradesh* reported in *(1975) 3 SCC 815* throws sufficient light. In somewhat similar circumstances, where the son is murdered and the father is the complainant, the only person mentioned as an eyewitness to the murder is named as Joginder Singh. The two daughters are mentioned in the FIR only as persons who saw the wrapping of the chadar on the wound of the deceased. It was noticed that significantly it is nowhere mentioned in the FIR that the appellant had stabbed the deceased. It was therefore held that it was inconceivable that by 9.15 p.m. it would not be known to the father of the deceased that the appellant had inflicted one of the two stabbed wounds on the body of Harbinder Singh. In para No.9 it is held as follows:

> *"9. No doubt, an FIR is a previous statement which can, strictly speaking, be only used to corroborate or contradict the maker of it. But, in this case, it had been made by the father of the murdered boy to whom all the important facts of the occurrence, so far as they were known up to 9.15 p.m. on March 23, 1970, were bound to have been communicated. If his*

daughters had seen the appellant inflicting a blow on Harbinder Singh, the father would certainly have mentioned it in the FIR. We think that omissions of such important facts, affecting the probabilities of the case, are relevant under Section 11 of the Evidence Act in judging the veracity of the prosecution case."

19. Another important aspect to be noticed is that, according to the prosecution, appellant No.1 was arrested at 4.30 p.m. on 31.07.2010, while appellant No.2 was arrested at about 8.30 p.m. on the same day. It is not the case of the prosecution that the appellants were absconding.

20. A cumulative reading of the evidence on record and the discussion made above raises serious lapses in the case of the prosecution and the impugned judgment. Firstly, the testimony of PWs.12 and 13 who are said to be the eyewitnesses and the children of the deceased, is far from being natural and highly difficultto believe. Their statement that they hid themselves in a neighbour's land for nearly 24 hours, without foodand water, cannot readily be believed. The elicitation from PW.11 that the two boys were present at the scene of occurrence at 9.00 p.m. would demolish the testimony of the two eyewitnesses. Secondly, the conduct of PW.14, the husband of the deceased in not informing the police that he saw the dead body of

his wife at 5.30 in the evening, raises serious doubt in the case of the prosecution. A serious blow to the case of the prosecution is also the testimony of PW.1, one of the neighbours who was doing construction work in the neighbouring land, who has stated in his evidence that at about 6.00 in the evening on the fateful day, when he was about to leave the place of work, he heard the cries of Dundappa (PW.14). PW.1 along with few others rushed to the spot. They saw the dead body of Kamalabai. He specifically states that by about 7.00 in the evening police came to the spot. Police noted the names of the persons who have gathered there, including the name of PW.1.

21. The manner in which the investigation has been held leaves much to be desired. The investigating officer has not placed any material which would substantiate the fact that PWs.12 and 13 were hiding in a place for nearly 24 hours. No information is available as to whether the land where PWs.12 and 13 claimed to have hidden is a place where they could hide themselves from the eyes of any passersby. The owner of the said land has not been examined. The FIR was registered at 7.00 a.m. on 31.07.2010, while the same is submitted to the Court at 10.15 p.m. It has been elicited from the police constable who carried the FIR from the police station to the Court that the police station is at a

distance of 100 meters from the Court. The enormous delay in lodging the complaint and submitting the FIR by the police to the Court, further weakens the case of the prosecution.

22. In *Kuna alias Sanjaya Behara vs. State of Odisha* reported in *(2018) 1 SCC 296*, it was noticed that the sole eyewitness, did not utter a sound or make a shriek or raise any alarm either to prevent the occurrence or to muster assistance from the inhabitants in the locality. It was noticed that the witness had admitted that there were about 150 to 200 inhabitants lodging nearby apart from the fact that the house of his relatives as well as the deceased were almost in the same campus. It was held that his plea that he did not disclose the incident to others immediately as he had been threatened by the appellant does not explain or justify in any manner whatsoever, his inexplicable silence or indifference during the time of commission of the act. Therefore, it was held that in the overallscenario, the plea of the defence that the evidence of PW-1 is highly improbable, absurd and doubtful, cannot be lightly brushed aside more particularly, in view of the test of essentiality of the degree of certainty, necessaryto accept that the facts narrated by the witness

as proved.

23. No doubt, the reaction of a person who has witnessed a gory act of murder could differ, depending upon person to person, the attending surroundings and circumstances. One may start screaming hysterically, the other may stand shell-shocked while another may muster courage to stop the crime from being perpetrated or report the same to the police. But, it is highly unbelievable that two young boys, aged about 14 and 15 years, having witnessed the murder of their mother, would go into hiding for nearly 24 hours without food and water. As observed earlier, one would become the strength for the other to atleast inform their father of the ghastly incident. Coupled with this, the conduct of PW.14 in not reporting the incident to the police, would further weaken the case of the prosecution.

24. Section 11 of the Indian Evidence Act, 1872, reads as follows:

> *"11. When facts not otherwise relevant become relevant.-- Facts not otherwise relevant are relevant-*
>
> > *1. if they are inconsistent with any fact in issue or relevant*

fact;

2. if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable."

In the considered opinion of this Court, the following facts which may otherwise seem irrelevant, become relevant, in the facts and circumstances of the case and for the reasons discussed above:

(i) Semi digested food in the stomach of the deceased.

(ii) Conduct of PW.14 in not reporting the death of his wife to the police.

(iii) Admission of PW.11 that PWs.12 and 13 were present at the scene of occurrence, late in the evening, along with PW.14.

(iv) Admission of PW.1 that the police arrived at the scene of occurrence at about 7.00 in the evening of 30.07.2010.

(v) Enormous delay in lodging the complaint and submission of the FIR before the Court.

25. On a comprehensive re-appreciation of the evidence and material placed on record, this Court is of the firm opinion that the testimony of the eyewitnesses is wholly untrustworthy and unbelievable. In criminal prosecution the standard of proof required for conviction is proof beyond all reasonable doubts. We donot hesitate to hold that the evidence of PWs.12 and 13, as eyewitnesses to the murder as projected by them, is wholly unacceptable being fraught with improbabilities, doubts and oddities, inconceivable with normal human conduct or behaviour and, thus cannot be acted upon as the basis of conviction. The testimonies of other witnesses, even if taken on their face value, fall short of the requirement of proof of the charge beyond all reasonable doubt.

26. Consequently, the appellants are entitled to the benefit of doubt. The contrary view taken by the trial Court is against the weight of the evidence on record and the exposition of law attested by the decisions cited herein above.

27. In the result, the appeal succeeds and is *allowed*. The impugned judgment is set aside. As a consequence, the appellants are acquitted and ordered to be set at liberty, if not required in connection with any other case.