

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 575 of 2016

Shivaji S/o Manikrao Nirmal,
Age : 53 Years, Occu. : Agri.,
R/o. Thergaon, Tq. Paithan,
Dist. Aurangabad.
Convict No. C/8142,
(At present is in Central Jail Aurangabad

... Appellant.
(Orig. Accused)

Versus

The State of Maharashtra,
Through Police Station Phulambri,
District Aurangabad

... Respondent

...
Mr. Sunil B. Jadhav, Advocate for Appellant (Appointed).
Mr. A. M. Phule, APP for Respondent/State.
...

**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATED : 09th JUNE, 2023

JUDGMENT (PER ABHAY S. WAGHWASE, J.) :

1. Appellant Shivaji has preferred instant appeal challenging his conviction and sentence recorded by Additional Sessions Judge, Aurangabad for commission of offence under section 302, 201 of Indian Penal Code (IPC) on trial of Sessions Case No. 191 of 2013.

FACTUAL MATRIX

2. On 19.03.2013, accused Shivaji Manikrao Nirmal

himself appeared before the police and informed that, two days back, he had committed murder of his wife and had buried her in the Pimpalgaon Shivar. Police machinery undertook the exercise of verification of the information and took steps for exhuming the dead body from gut no.108. On identification of dead body, crime was registered bearing no. 28 of 2013 for offence punishable under sections 302 , 201 of IPC, accused came to be arrested.

3. During investigation, spot was drawn, PM was done at spot, PM report was gathered, there was disclosure of memorandum at the instance of accused regarding handing over hoe/spade and bamboo stick. Statements of relevant witnesses were got recorded, both under sections 161 and 164 of Cr.P.C. and after gathering sufficient evidence, accused were charge-sheeted and made to face trial.

After appreciating the oral and documentary evidence adduced by prosecution and after hearing both sides, learned trial Judge recorded the guilt for offence under sections 302 and 201 of IPC and awarded life imprisonment. Such judgment and order of conviction is now assailed before us by filing appeal under section 374 of Cr.P.C.

RIVAL SUBMISSIONS

On behalf of Appellant :-

4. Learned counsel for appellant would submit that, at the outset, FIR is on the confessional statement before police and therefore, the same has no evidentiary value in the eyes of law. He further submitted that, there is no eye witness and case being based on circumstantial evidence, all the circumstances ought to have been firmly and cogently established beyond reasonable doubt. However, such legal requirements are not met in the evidence of prosecution and therefore, judgment and order of conviction is not sustainable. He pointed out that, even memorandum of disclosure and the recovery and discovery at the instance of accused, are not voluntary. According to him, depositions of prosecution witnesses are not properly appreciated and conclusions are drawn by the learned trial Judge on the basis of conjectures and surmises. That, case being not proved beyond reasonable doubt, benefit of the same ought to have been extended to the accused. He submitted that case of prosecution was that incident of assault had taken place at one place, whereas body is recovered from another spot and as such there is considerable ambiguity in the prosecution evidence. Taking us through the oral evidence, he submitted that in spite of both sons, daughter and son-

in-law stepping into the witness box, it is clear that whatever information they got is from police and therefore, their testimonies are of no avail to prosecution. It is his further submission that, case being based on circumstantial evidence, prosecution was duty bound to establish motive behind the alleged murder. But, according to him, here prosecution failed to prove motive and therefore, it is his submission that entire case of prosecution gets collapsed. Consequently, while summing up he would submit that the impugned judgment and order under challenge being contrary to law and based on erroneous appreciation, the same deserves to be set aside by allowing the appeal.

On behalf of State :-

5. In answer to above, learned APP would support the judgment by pointing out that it has come on record that there were quarrels between accused and deceased. Deceased was in the company of accused in the house of son-in-law (PW-2). Such witness have categorically stated about accused and deceased visiting house for stay and while such witness was away with his wife, i.e. daughter of accused and deceased, accused assaulted her and committed her murder and thereafter buried her body for causing disappearance of evidence. Subsequently, accused himself surrendered before the police and gave information about

committing murder of his wife. Recovery of body is at his instance. Therefore, it is submitted that it is not at all a confession. Investigation revealed his complicity and was therefore he was rightly charge-sheeted and tried. It is submitted that, the learned trial Judge has correctly appreciated the available evidence, both oral and and documentary. That, there is no infirmity or perversity in the same so as to disturb the sound and reasoned findings and consequently her prays for dismissal of the appeal.

EVIDENCE AND ITS ANALYSIS

6. PW-1 Satish, son of accused and deceased spoke about his parents leaving the house together to go to house of sister Savita at Pimpalgaon. They had reached there and stayed there. Thereafter, his sister and her husband (PW-2) went to Shirdi for darshan, whereas accused and deceased stayed back at Pimpalgaon. On 18th of that month, he was urgently called along with his other brother Pimpalgaon. Thereafter, his sister's husband took his brother Santosh to aside and told him something. Thereafter, police came and he learnt that their mother had died. He stated that he does not know, how she died. Therefore, not finding him supporting, he was declared hostile and cross examined by prosecution himself.

7. PW-2 Krishna, son-in-law of accused gave evidence that, on 16.03.2013, his parents-in-law came to him. After meals, while he and his wife were about to go to Lasur, his mother-in-law suggested them to go to Shirdi. Accordingly, he himself, his wife and Ganesh went to Shirdi, whereas his parents-in-law and his daughter Baghyashri stayed back in the house. On 18.03.2013, when they returned, he did not find his mother-in-law. Accused father-in-law informed that she went to her mother's place at Mahakal. Shortly, thereafter accused left the house go to answer call of nature, but did not return. After sometime, police brought his father-in-law. He learnt that father-in-law had buried dead body of mother-in-law in the field of Dagdu, after killing her. He stated that, his father-in-law showed the place where dead was buried. That, his daughter Bhagyashri told that their father-in-law killed his mother-in-law in the field of Appasaheb. According to him, his parents-in-law were quarreling with each other.

8. PW-3 Appasaheb is the owner of the field bearing gut no.100, in his presence police came with accused. There was shed erected in the field. Blood stains were found on the door of the shed. He stated that house of PW-2 Krishna is of two furlong from his place in gut no.108. There was a heap of dried toor crop in the house and there were bloods stains on the heap of dried toor crop.

He states that there were marks of dragging of dead body to the field of gut no.108 and dead body was found buried there. He identified the panchnama (Exh.19).

9. PW-4 Sayyad Afzal panch to the inquest and PW-5 Kakasaheb, panch to panchanama (Exh.-27).

10. PW-6 Bhimrao father of deceased. He stated that there was ill treatment to his daughter Indubai by accused since after marriage.

11. PW-7 Savita, daughter of accused and deceased. She too stated that her parents had come to her house and after meals, she and her husband, while going towards Lasur station were asked by deceased to visit Shirdi. Therefore, she went with her husband. Her parents stayed with their daughter. When they returned, mother was not seen in the house. Accused told that she went to Mahakal and left the house for answering call of nature, but did not return back. Next day, accused himself went to police station. Thereafter, she saw the dead body of the mother in the field of Dagaduba. According to her, there were quarrels between her parents.

12. PW-8 Dattu, panch to memorandum of disclosure and seizure of spade and bamboo stick (Exh.34 and 35).

13. PW-9 Harishchandra, Naib Tahsildar (Revenue), who carried out panchanama of exhumation of dead body (Exh.27).

14. PW-10 Santosh, another son of accused and deceased. According to him, his parents went to Pimpalgaon to see his sister. He learnt from PW-2 Krishna about accused beating deceased. Later on, he was called at Pimpalgaon and he was shown the dead body of his mother. But, he stated that he does not know how it happen.

15. PW-11 Bhausahab, panch to exhumation panchanama (Exh.27).

16. PW-12 Dr. Smitha Deshpande, autopsy doctor and PW-13 Prafulla is the Investigating Officer.

ANALYSIS

17. Admittedly, case in hand is based on circumstantial evidence. Prosecution's case is that accused surrendered himself and informed about killing his wife and thereafter investigation

revealed that he had committed her murder by use of spade and bamboo stick and thereafter had buried her dead body. Body was also recovered at his instance and therefore, case is established against him.

On the contrary, learned counsel for appellant would submit that being confessional FIR, it has no evidentiary value, likewise even so called recovery discovery is not voluntary. Hence, according to him prosecution utterly failed to bring home the guilt by leading firm and cogent evidence.

18. On carefully analyzing the evidence, it is seen that, very sons (PW-1 Satish, PW-10 Santosh) , daughter (PW-7 Savita), and son-in-law, (PW-2 Krishna) have stepped into the witness box. They are all consistent about accused and deceased coming to Pimpalgaon to the house of daughter Savita. Even while answering section 313 of Cr.P.C., accused admitted to that extent. Daughter and son-in-law, both are consistent about they going to Lasur station and on the request of deceased further going to Shirdi for darshan and to meet brothers-in-law. Both these witnesses are categorical about accused, deceased and their daughter Bhagyashri aged 6 staying back in the house. PW-2 Krishna and PW-7 Savita, husband and wife proceeded to Lasur and thereafter to Shirdi by entrusting their girl child in the custody of deceased and accused

as they seem to be assured that their daughter is safe with her grandparents. On 18th of that month, when they came, deceased was found missing. PW-2 Krishna, son-in-law spoke about his daughter aged 6 informing about grandfather beating grandmother. Unfortunately, child is not examined.

19. Prosecution here claims that accused produced himself before police and gave information about killing his wife burying her dead body.

True it is that, confessional FIR cannot be used against accused. However, his conduct of himself approaching police and giving information can definitely be put to use against him by virtue of section 8 of Indian Evidence Act. It is to be noted that, dead body is also discovered at his instance. Law to this extent is propounded in various cases time and again by the Hon'ble Apex Court including in the case of *Bheru Singh S/o Kalyan Singh Vs. State of Rajasthan*, reported in (1994) 2 SCC 467. Therefore, it cannot be said that such evidence cannot be used against accused. Investigation not only revealed dead body, but even the spot where alleged incident took place are shown by accused in presence of independent panchas and panchanama regarding blood stains at the spot were gathered was drawn. As stated above, very children

of accused and deceased have stuck up to their version about regular quarrels taking between accused and deceased. Though, above witnesses are cross-examined, their testimonies are not impeached in any manner to that extent.

20. Aspect of accused and deceased visiting house of their daughter Savita is consistently and categorically stated by their children. This aspect is not denied by accused even while answering under section 313 of Cr.P.C., rather he confirms it. Under such circumstances, when it has clearly come on record that deceased was in company of accused since 18.03.2013 till arrival of children and son-in-law, how deceased went missing and how her dead body was found in buried condition, was expected to be explained by accused. It seems that he has informed his children that deceased went to her mother's place at Mahakal. Dead body is said to be recovered from place which is adjoining to the land wherein PW-2 Krishna resided and where accused and deceased had come to stay. It is also pertinent to note that recovery of dead body is at his instance. Therefore, the explanation given by him about wife going to her mother's place is rendered false. Therefore here giving false explanation can be used as additional link. Death is said to be on account of injuries to the head. There is recovery of spade and bamboo stick at his instance. Therefore, there are strong

circumstances about deceased meeting death while she was in the custody of accused. Accused has not discharged the onus of showing how his wife met death with head injuries. Consequently such circumstances go against him.

21. We have considered the judgment under challenge. Learned trial Judge has considered each and every aspect of the matter and has tested the evidence in the light of legal requirements and thereafter conclusion has been reached at. Learned counsel for appellant could not point out any perversity or illegality in the judgment and the manner of appreciation of available evidence. Resultantly, no case being made out on merits for any interference, we proceed to pass following order :

ORDER

(i) The criminal appeal is rejected.

(ii) Fees of the appointed Advocate for the appellant is hereby quantified at Rs.10,000/- to be paid by the High Court Legal Services Sub Committee, Aurangabad.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)