



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.1214 OF 2019

Shankar Vitthal Khare,
Age : 25 years, Occ. Labour,
r/o. Yellam Galli, Renapur,
Dist. Latur

..Appellant

Vs.

The State of Maharashtra

..Respondent

Mr.A.K.Bhosale, Advocate for appellant
Mr.S.V.Hange, APP for respondent

**CORAM : R.G.AVACHAT AND
NEERAJ P. DHOTE, JJ.
RESERVED ON : JUNE 06, 2024
PRONOUNCED ON : JUNE 19, 2024**

JUDGMENT (PER R.G.AVACHAT, J.) :-

The challenge in this appeal is to the judgment of conviction and order of consequential sentence dated 30.10.2018, passed by learned Addl. Sessions Judge, Ambajogai, Dist. Beed, in Sessions Case No.32 of 2015. Vide the impugned order, the appellant was convicted for the offences punishable under Sections 302 and 392 of Indian Penal Code and therefore, sentenced to suffer life imprisonment and R.I. for three years and to pay fine of Rs.10,000/- and Rs.5,000/-, respectively, with default stipulation.

2. PW 3 - Manik (informant) was resident of village Dadahariwadgaon, Tq. Parali, Dist. Beed. He holds two agricultural lands at two different places in the very village. One land was known as "Ruka". It was adjoining to the land of one Kamalbai Pawar. Meenabai (deceased) was his wife. On every early morning, she would go to Rehabilitation Colony to sell vegetables and milk. On 07.01.2015, as usual, she went to Rehabilitation colony. By little past 09.30 a.m., he went towards the field Ruka. The work of sugarcane cutting was underway in the field of Kamalbai. A few of the workers of sugarcane harvesting, came running to inform that a lady in an injured condition was lying in the sugarcane field. He (PW 3 - Manik) went there to find that it was his wife Meenabai. He, immediately, approached his brother-in-law Dnyanoba Gutte and asked him to come in auto-rickshaw. He came. Meenabai was rushed to Dr.Gutte's hospital at Parali-Vaijnath. Dr.Gutte, in turn, directed them to shift her to Government Hospital, Parali. The Medical Officer at the Government Hospital told PW 3-Manik that Meenabai was passed away. Inquest panchnama (Exh.32/C) was conducted at the hospital at Parali. The mortal remains of Meenabai were subjected to post mortem examination (P.M. report Exh.54/C). PW 3 - Manik received the dead body. He first conducted funeral and then, approached Rural Police Station, Parali, and lodged First Information Report

(Exh.34/C). Since the post mortem report (Exh.54/C) indicates that deceased died of strangulation with asphyxia with head injury, crime vide C.R. No.6 of 2015 came to be registered for the offence punishable under Section 302 of Indian Penal Code. PW 3 – Manik, seven days after registration of the crime, gave supplementary statement that deceased Meenabai was sporting gold and silver ornaments. The ornaments on her person were found to have been missing. Section 392 of Indian Penal Code, therefore, came to be invoked. During investigation, it was revealed that the appellant was seen coming from the very sugarcane field in the morning of the fateful day. The timing of his coming from the sugarcane field was close to the timing, by which Meenabai (deceased) met with some incident, wherein she was killed.

3. The appellant was serving with a Dhaba owned by PW 6 – Prakash. On the very day, the appellant took leave. His involvement, therefore, was very much suspected. When the employer (PW 6 – Prakash) was asked to call the appellant back to hotel, the appellant returned. He was arrested. He made a disclosure statement (Exh.39/C), pursuant to which some gold and silver ornaments came to be seized from the place belonging to his real brother. PW 3 – Manik identified those articles to have belonged the deceased. The

clothes on the person of the appellant were also seized. The statements of the persons acquainted with the facts and circumstances of the case were recorded. Upon completion of the investigation, charge sheet was filed against the appellant in the court of Judicial Magistrate, First Class, Parali. Learned Magistrate committed the case to the Court of Session. The case, in turn, was assigned to the Court of Addl. Sessions Judge, Ambajogai (trial court), for trial in accordance with law.

4. The trial court framed Charge (Exh.7/C). The appellant pleaded not guilty. His defence was of false implication. The prosecution, in order to bring home the Charge, examined ten witnesses and produced in evidence certain documents. The trial court, on appreciation of the same, convicted and consequentially, sentenced the appellant, as stated above.

5. Heard learned counsel for the parties.

6. Learned counsel for the appellant would submit that the case is based on the circumstantial evidence. The FIR is silent to state that there were ornaments on the person of deceased Meenabai. PW 3 – Manik received the dead body along with the ornaments on the person of the deceased. The appellant,

admittedly, used to visit the place nearby the crime scene, to answer the nature's call, in the early morning and for fetching grass for cattle of his employer. It was, therefore, nothing unusual that the appellant was seen coming from that place. According to learned counsel, the seized ornaments were not subjected to test identification. PW 3 - Manik identified them before the court for the first time. In short, according to learned counsel, none of the circumstances relied on by the prosecution, have been conclusively established to reach to the conclusion that it was the appellant and none other, has committed murder of Meenabai for gold ornaments. He, therefore, urged for allowing the appeal.

7. Learned APP would, on the other hand, submit that the conduct of the appellant itself indicates his involvement in the crime. He was seen coming out of the sugarcane field at the material time. He bowed the head down. The appellant talked with PW 5 - Mahadev @ Bandu, with whom he first met after coming out of that field and took that person aside. Same indicates that the appellant tried to deflect the attention of the said person. The evidence of the employer of the appellant (PW 6 - Prakash) was then adverted to. Learned APP would submit that PW 6 - Prakash had not asked the appellant to fetch grass for his hares. The appellant lied before PW 5

- Mahadev @ Bandu in stating to have been to the place nearby the crime scene to collect grass at the instance of his employer. Learned APP then adverted our attention to the fact that on arrest of the appellant, he made disclosure statement and led to the house of his real brother. Gold and silver ornaments were hidden underground in the house of the appellant's real brother. He pointed out the said place. The ornaments were taken out. PW 3 - Manik (husband of the deceased) identified those articles. Learned APP further submitted that the appellant had left the village very day under the pretext of paying money of *Bhishi* to one of his relatives. According to learned APP, the evidence on record establishes each and every circumstance relied on by the prosecution. The same completes the chain of circumstances to reach to the conclusion that it was the appellant and none else, who committed the crime in question with the motive of robbery. He, therefore, urged for dismissal of the appeal.

8. Considered the submissions advanced. Perused the evidence on record. Also perused the impugned judgment. Let us advert to the evidence on record and appreciate the same.

9. Admittedly, Meenabai met with homicidal death. PW 2 - Dattatraya is witness to the inquest panchnama (Exh.32). Same

indicates the deceased to have suffered head injury. PW 9 – Dr Sk. Arshad conducted post mortem examination. In his opinion, Meenabai died due to “strangulation with asphyxia with head injury”. Moreover, the crime scene panchnama (Exh.27/C) indicates that a bunch of vegetables, three milk-cans, a log of neem-tree, Chappal and blood stains were noticed in the sugarcane field belonging to Kamalbai. All this evidence indicates Meenabai met with homicidal death.

10. The question is whether, it is the appellant and none else to have committed murder of Meenabai. The case is based on circumstantial evidence. In the case of **Sharad Birdhichand Sarda Vs. State of Maharashtra, (1984) 4 SCC 116**, the Apex Court has observed thus :-

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established.

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) The circumstances should be of a conclusive nature and tendency,

(4) They should exclude every possible hypothesis except the one to be proved, and

11. The prosecution relies on the following circumstances to bring home the Charge:-

- (i) The motive was to rob the deceased of the ornaments on her person;
- (ii) The appellant was seen coming from the sugarcane field of Kamalbai at the material time, by which time the deceased met with homicidal death;
- (iii) The appellant lied to have been there to collect grass for his employer (PW 6 – Prakash);
- (iv) The appellant left the village with the leave of his employer, PW 6 – Prakash. He returned back to the village only after his employer asked to come;
- (v) On his arrest, he made disclosure statement pursuant to which gold and silver ornaments came to be recovered from the place belonging to his real brother. The ornaments were concealed underground.
- (vi) The seizure of clothes on the person of appellant at the relevant time.

12. PW 3 - Manik, husband of deceased Meenabai, lodged the FIR (Exh.34). It is in his evidence that he owned land (Ruka) at village Dadahariwadgaon. Said land adjoins the land of Kamalbai Pawar. It is further in his evidence that Meenabai would leave the house early in the morning everyday, for sale of vegetables and milk at Rehabilitation colony in the nearby. On the given day, i.e., 07.01.2015, Meenabai had left the house for the same. Little past 09.30 a.m., he went to his field (Ruka). The work of sugarcane cutting was underway in the field of Kamalbai. Two-three workers engaged in the work of sugarcane cutting, came shouting from the field. They informed him that a lady was lying in the injured condition in the sugarcane field. He (PW 3-Manik) went there to find that it was his wife Meenabai. He, immediately, approached his brother-in-law Dnyanoba Gutte and asked him to come in auto-rickshaw. He came. Meenabai was rushed to Dr.Gutte's hospital at Parali-Vaijnath. Dr. Gutte, in turn, directed them to shift her to Government Hospital, Parali. The Medical Officer at the Government Hospital told PW 3 that Meenabai was passed away. Inquest panchnama (Exh.32/C) was conducted at the hospital at Parali. The mortal remains of Meenabai were subjected to post mortem examination (P.M. Report Exh.54/C). PW 3 - Manik received the dead body. He first conducted funeral and then, approached the Rural

Police Station, Parali and lodged First Information Report (Exh.34/C).

13. It is true that PW 3 – Manik pointed out the crime-scene. He identified the silver and gold ornaments shown to him before the court. According to him, those articles were on the person of the deceased Meenabai when the incident took place. He, therefore, gave supplementary statement in this regard. PW 3 – Manik was subjected to the searching cross-examination. It has been brought on record through his cross-examination that there was only one foot-way in the village, which passes through the field of Kamalbai Pawar, to go outside of the village. He admitted that there was compound-wall to the village. Said foot-way meets Parali-Gangakhed road. According to him, the sugarcane cutting work started little past 08.30 a.m. on the given day. He, admittedly, visited the field when sugarcane cutting was underway. He was confronted with his FIR (Exh.34). Admittedly, the FIR did not contain the matter that the deceased was sporting gold ornaments like Mangalsutra, ear-studs, Jodve, silver bangles and Patlya. This is the material omission in the FIR, which amounts to contradiction so as to disbelieve the evidence of PW 3 – Manik to certain extent. It is only on 14.01.2015, i.e. seven days after the incident, he gave the supplementary statement to the police, stating therein the description of the gold

and silver ornaments on the person of the deceased. According to learned APP, the value of the ornaments was not very much. Most of them were silver articles. Those could have been kept by the appellant in his pocket and therefore, was not seen carrying in a bag. He may be correct in his submissions but the evidence is other way round.

14. PW 5 – Mahadev @ Bandu's evidence is to the effect that on the given day, he was at his Akhada. He performed daily morning work including, feeding of his cattle and milking. He then proceeded to meet his employer. He was passing from the field of Kamalbai. It was post 07.30 a.m., he saw the appellant coming out of sugarcane field with his head bowed. PW 5 – Mahadev @ Bandu questioned the appellant as to how he was there. The appellant, in turn, replied him to have come to take grass for hares of his employer Prakash (PW 6). Then, both parted ways. PW 5 – Mahadev went to the place of his employer. The appellant went to the Dhaba, since he was working as a Waiter with the Dhaba (roadside hotel/eatery) belonging to PW 6 – Prakash. PW 5 – Mahadev @ Bandu was confronted with his previous statement. He admitted to have had not disclosed that he saw the accused came out of the sugarcane field by bowing down head (omission is to the extent of word “bowed”).

15. Then, we have evidence of PW 6 – Prakash, employer of the appellant. It is in his evidence that he runs a hotel (Hotel Raigarh) at Parali – Gangakhed road. The appellant was serving as a Waiter in his hotel. He went to the hotel on the given day, i.e. 07.01.2015. He woke the appellant up and asked him to milk the buffalo. Then, he returned back his home with milk. He again returned to the hotel at 08.30 a.m. The appellant was present in the hotel. The appellant told him to have learnt from some other people that in the sugarcane field, a lady was killed. PW 6 - Prakash, therefore, went to the field (crime-scene). It was 09.45 am. He went to the hotel, since he learnt the lady to have been shifted to the hospital. He then went to the hospital and remained there until post mortem was conducted. He also attended the funeral. He went back to his house and again, returned to the hotel. It was about 06.00 p.m. It is further in his evidence that the appellant told him that he wanted to visit his village in order to pay money of *Bhishi* to his maternal aunt. The appellant also assured to return to the hotel within 4-5 days. PW 6 - Prakash, therefore, dropped the appellant at Parali Railway bridge. It is further in his evidence that the police came to the hotel after two days and inquired about the appellant. He called the appellant back to the hotel at the instance of the police. The appellant, accordingly, came back after two to four days.

PW 6 – Prakash, during his cross-examination, was confronted with his police statement dated 21.01.2015, wherein, it has been recorded that the appellant told that he wanted to go to his village to pay money of *Bhishi* to his maternal aunt. It is he (PW 6-Prakash), who handed over the appellant to the custody of the police.

16. There is evidence of PW 7 – Arun. It is in his evidence that he was proceeding towards his field at 07.30 a.m. on 07.01.2015. He saw one boy was talking with Mahadev @ Bandu (PW 5). He identified the appellant before the court as that boy.

17. PW 4 – Anil is witness to the disclosure statement (Exh.39) made by the appellant on 18.01.2015, pursuant to which he took the police and panch witness to a particular place in the compound of a house at a distance of 35 kms. away from village Dadahariwadgaon. The appellant gave call as “Jyoti”. A lady opened the door. Just outside the said house but within the compound, there was hearth (*Chulha*). The appellant pointed out a place nearby the Chulha. The place was dug up. A plastic bag containing gold and silver ornaments, i.e. gold beads, black beads, gold pendant, two gold ear-tops, two silver bangles, two silver *Patlya*, two silver leg-chains were found. Those were seized under panchnama (Exh.40).

18. On the same lines, is the evidence of PW 10 - Vishwambar (Investigating Officer). We, therefore, do not propose to refer to his evidence in extenso.

19. PW 9 - Dr.Sk. Arshad is witness to the panchnama of recovery of clothes of the appellant, pursuant to his disclosure statement (Exh.47 and 48). Since the clothes seized did not bear any blood stains or there was nothing to indicate that the very clothes were on his person when the incident took place, said disclosure statement would not be relevant under Section 27 of the Evidence Act.

20. Let us appreciate the aforesaid evidence. Admittedly, the dead body of Meenabai was found in the field of Kamalbai Pawar. Sugarcane crop was standing in the said field. The work of sugarcane cutting was underway. There is no exact evidence to indicate, whether the work of sugarcane cutting had started early morning. The evidence of PW 3-Manik, however, indicates that same had started by 08.30 a.m. Kamalbai's field adjoins the land of the informant (PW 3 Manik). Admittedly, the village Dadahariwadgaon has its boundary wall. It is also an admitted fact that to go out of the village Dadahariwadgaon, there is a footway (pathway) that goes through the land of Kamalbai. That was the only way to go out of the

village. That footway ends at Parali-Gangakhed road. As such, it is but natural for all the villagers and inhabitants of that locality to go by that footway. There is also evidence to indicate that the appellant would visit Kamalbai's field almost everyday morning to answer the nature's call and/or to collect grass for cattle of his employer. True, there is evidence of PW 5 - Mahadeo @ Bandu to have seen the appellant coming out of the field of Kamalbai. The appellant told him to have had been there to collect grass for hares of his master (employer). There is no evidence to indicate whether there was grass in his hand or not. The evidence of his employer, PW 6 - Prakash, is silent to state to have had asked the appellant to go to the field of Kamalbai and collect grass. PW 7 - Arun's evidence indicate that he saw that the appellant was talking with PW 5 - Mahadeo @ Bandu. Admittedly, PW 7 - Arun was not knowing the appellant. His evidence indicates that he saw one boy in the company of PW 5 - Mahadeo @ Bandu. The Investigating Officer did not hold test identification parade to establish identity of the boy, who was seen by PW 7 - Arun, in the company of PW 5 - Mahadeo @ Bandu, at the relevant time. It is for the first time, PW 7 - Arun identified the appellant before the court to be the said boy who was seen with PW 5 - Mahadeo @ Bandu at the relevant time.

21. One must take judicial notice of the fact that in the case in hand, the appellant was the only accused. In the trial court, there is separate dock meant for the accused to seat. It is, therefore, easy for a witness to identify the accused before the court. PW 7 - Arun's identification of the appellant for the first time before the court would, therefore, be of little consequence. Even if we accept the evidence of PW 7 - Arun as it is, what he had seen was that the appellant was in the company of PW 5 - Mahadeo @ Bandu. PW 5's evidence indicates that he had seen the appellant coming out of the field of Kamalbai and on meeting him, the appellant told him to have come to collect grass for the hares of his employer. The evidence of PW 6 - Prakash (employer) is silent to state that he had asked the appellant to collect grass. His evidence indicates that he had asked the appellant to milk the buffalo. His evidence is, however, silent or it can be said that the prosecution has not brought on record through his evidence that he had not asked the appellant to fetch grass for his hares. If we rely on the evidence of PW 5 - Mahadeo @ Bandu as it is, what has been proved that the appellant had come out of the sugarcane field of Kamalbai in the morning (little past 07.30 a.m.) and he told PW 5 - Mahadeo @ Bandu to have come to collect grass. True, a little later, the dead body of Meenabai was found in the very sugarcane field wherefrom the appellant was seen coming out.

There is, however, evidence to indicate that the work of sugarcane cutting was underway. It started by 08.30 in the morning. It was according to PW 3 – Manik (informant). There is nothing concrete investigation as to when the work of sugarcane cutting had commenced. There is further evidence to indicate that for the work of sugarcane cutting not less than 15-20 workers were residing at the field of Kamalbai, since before the fateful day.

22. True, the evidence of PW 6 - Prakash, employer of the appellant, proves that the appellant took leave from his job to visit his relative's house but the appellant was there all the day on 07.01.2015. It was only by 06.30 p.m., the appellant left the hotel to go to the village of his maternal aunt for paying money of *Bhishi* to her. On his returning back to the hotel, his clothes came to be seized from a particular place in the hotel. Same indicates that he had not left the village taking along all his belongings namely, clothes. The appellant remained in the village all the day, which indicates that his conduct was not inconsistent with his innocence.

23. The material evidence, which the prosecution has heavily relied on to connect the appellant with the crime, is his disclosure statement and recovery of gold and silver ornaments, pursuant thereto under panchnama (Exh.39/C). The evidence in that regard of

PW 4 – Anil and the Investigating Officer has been referred to above. There is no evidence to indicate that the place wherefrom those articles were seized, belonged to the appellant's brother. Neither his brother nor the lady by name, Jyoti, has been examined by the prosecution. We have every reason to find that the alleged disclosure statement made by the appellant might be a fabricated evidence.

24. PW 3 – Manik, informant, was confronted with the receipt dated 07.01.2015, whereunder, he received the dead body of his wife, which reads as under:-

“ कारणे पावती लिहून देतो कि, एम.एल.सी. पत्रक आ. मृत्यू नंबर मयत नामे मीनाबाई माणिक मुंदे, वय ५० वर्ष, रा.(बा) वडगाव, ता. परळी, यांचे प्रेतावर पोस्टमार्टेम (P.M.) झालेनंतर प्रेत मयताचे अंगावरील कपड्यासह आणि सर्व चीजवस्तूसह मयताचे प्रेतावर अंत्यविधी करणेसाठी माझे ताब्यात मिळाले. त्याबद्दल माझी काही एक तक्रार नाही.
हि पावती लिहून दिली खरी व बरोबर आहे.”

The receipt is given by him to the police officer acknowledging to have received dead body of Meenabai along with the ornaments. It would, therefore, does not stand to reason to rely on the evidence of PW 3 – Manik, informant, that lateron he realised that there were ornaments on the person of the deceased and those went missing or robbed while she was killed. We are not in agreement with the findings of the trial court in this regard. According to the trial court,

there were other ornaments as well and the receipt must be pertaining to few ornaments, which were there on the dead body of Meenabai. The trial court relied on the post-mortem report (Exh.54/c) in this regard. We have examined column no.6(II) in the post-mortem report. It pertains to what has been noticed on external examination of the dead body. It reads thus:

Female, appr. 50 yrs., Hindu, wearing greenish coloured saree, black coloured blouse, brown bangles, silver coloured Jodve on both legs and toe, golden coloured ring in right hand index finger, golden coloured nathni (small) and ear ornaments (small) – stained with blood and mud.

25. The same suggests that there was a gold-ring in one of the fingers of the deceased. Ear ornaments were also there. When many of the gold and silver ornaments were said to have been robbed by the culprit while committing murder of the victim, the post-mortem examination report indicates that all were found on the dead body while it was subjected to autopsy. When the ear-ornaments/studs were very much there, we are surprised to find in the list of the recovered ornaments, pursuant to the disclosure statement of the appellant, mention of articles recovered as ear-studs. How the ear-studs came to be recovered pursuant to the disclosure statement made by the appellant. One would not be

sporting two gold ear-studs at the same time in one ear. Same indicates that PW 3 - Manik lied that while lifting the dead body of Meenabai, he found that her ornaments were not on her person. His evidence in the examination-in-chief is conspicuously silent to come clean to admit to have had received gold and silver ornaments, which were there on the person of the deceased, along with the dead body.

26. Even if we accept the disclosure statement of the appellant, pursuant to which the gold and silver ornaments came to be recovered, the FIR was silent to mention therein what kind of ornaments the deceased was sporting and their description. All the description finds place in the supplementary statement of the informant dated 14.01.2015. Same was recorded post arrest of the appellant. The Investigating Officer, on alleged seizure of those articles, pursuant to the so called disclosure statement made by the appellant, did not subjected them to test identification. Surprisingly, the evidence indicates that all the ornaments were returned to PW 3 - Manik, informant, along with the dead body. For not conducting test identification of those articles and the FIR being conspicuously silent to record that all the ornaments on the person went missing or robbed while Meenabai was murdered, it would not be justifiable on

our part to rely on the said disclosure statement and recovery of articles pursuant thereto and to connect the appellant with the offence of robbery with murder.

27. The circumstances relied on by the prosecution, even if taken individually and/or cumulatively, did not conclusively establish to conclude that the appellant and none else, has first robbed the deceased and then committed her murder.

28. On re-appreciation of the evidence, we find the prosecution to have failed to establish the guilt of the appellant beyond reasonable doubt. Interference with the impugned order of conviction and consequential sentence is, therefore, warranted.

29. In the result, the appeal succeeds. Hence, the following order:-

(i) The appeal is allowed.

(ii) The impugned order dated 30.10.2018, passed by learned Addl. Sessions Judge, Ambajogai, Dist. Beed, in Sessions Case No.32 of 2015, convicting and sentencing the appellant for the offences punishable under Sections 302 and 392 of Indian Penal Code, is set aside. The appellant stands acquitted thereof.

(iii) The appellant be released forthwith, if not required in any other case.

(iv) Fine amount paid by the appellant, if any, be refunded to him.

[NEERAJ P. DHOTE, J.]
KBP

[R.G. AVACHAT, J.]